Jay

1 STATE OF INDIANA)
) SS:
2 COUNTY OF MARION)

3

4 IN THE SUPERIOR COURT OF MARION COUNTY

5 YVONNE ROGERS, Individually)
and as Executrix of the Estate)
6 of Richard Rogers, Deceased,)
)
7 Plaintiffs,)
)
8 -vs-) CAUSE NO.
) 49D02-9301-CT-0008
9 R. J. REYNOLDS TOBACCO CO.,)
et al.,)
10)
Defendants.)
11 ----------

12

13

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REPORTER'S TRANSCRIPT OF PROCEEDINGS
15
BEFORE: HON. KENNETH H. JOHNSON, JUDGE
16

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18

19 VOLUME II
February 7, 1995
20 Afternoon Session

21 _____
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1 (The proceedings resumed at 2:24 p.m.,
2 February 7, 1995, Judge Kenneth H. Johnson
3 presiding.)
4 THE COURT: The jury may be
5 seated.
6 We're ready to continue with the
7 cross-examination of Dr. Jay.
8 MR. HARDY: For Philip Morris, no
9 questions.
10 THE COURT: All right. Thank
11 you, Mr. Hardy.
12 MR. KEARNEY: Your Honor, for
13 Liggett, no questions.
14 THE COURT: Thank you, Mr.
15 Kearney. Any redirect?
16 MR. WARREN HOLLAND: Yes, your
17 Honor.
18 THE COURT: I suspected it.
19 REDIRECT EXAMINATION,
20 QUESTIONS BY MR. C. WARREN HOLLAND:
21 Q Dr. Jay, this large blowup of this language
22 here that was discussed at great length in your
23 cross-examination, so there's no question, that

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1 is from the 1964 Surgeon General's Report; is
2 that correct?
3 A Yes.
4 Q In other words, as of today, it is 30 years
5 old?
6 A Yes.
7 Q And since that time, there have been a number
8 of annual reports, have there not?
9 A Yes.
10 Q Doctor, if -- I would like to hand you a couple
11 OF things here so that we can discuss them.
12 MR. WARREN HOLLAND: May I stand
13 here for a moment?
14 THE COURT: Yes, sir.
15 Q I am handing you, Doctor, a newspaper clipping
16 from the Indianapolis Star of December 21st,
17 1994. I wonder if you would look that over,
18 and then I'll ask you a couple questions about
19 it.
20 A (Nods head affirmatively.)
21 Q Had you seen that before, I mean, in other
22 words, some type of discussion of that?
23 A I have, yes.

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1 Q I wonder if you would read the first paragraph
2 of that article for the Court and jury, please.
3 A This article is entitled "Household Radon is
4 not Tied to Lung Cancer, Study Finds."
5 First paragraph, "The study of nonsmokers
6 in Missouri found no link between household
7 radon gas levels and lung cancer, researchers
8 report.
9 "In a study to be published today in the
10 Journal of the National Cancer Institute,
11 researchers compare the radon exposure of 538
12 nonsmoking Missouri women who have lung cancer
13 with the radon exposure of 1,183 matched
14 subjects who did not have cancer."
15 Q Thank you. Then I'm going to hand you what
16 purports to have appeared in the Indianapolis
17 Star on June 27th, 1994. And I'd ask you to
18 look that over for a moment. Then would you
19 tell us what the caption of that story is.
20 A This is from the Indianapolis Star, June 27th,
21 1994. The title, "Nevada First, Indiana
22 Seventh in Rates of Deaths Caused by Use of
23 Tobacco Products."

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1 Q Then I wonder if you would read for us the
2 second paragraph there, referring to Indiana.
3 A Second paragraph states, "Indiana had the
4 seventh highest rate with 20.7 percent of all
5 deaths blamed on tobacco use --"
6 MR. McELVEEN: Judge, let me
7 interpose an objection. This is an all-death
8 article as opposed to lung cancer. I don't
9 think it's responsive to what we raised on
10 cross-examination which was, as you may recall,
11 with reference to lung cancer.
12 MR. WARREN HOLLAND: There was
13 extensive questioning about cancer in general
14 and all types of risks that were involved here,
15 your Honor, both on direct and --
16 MR. McELVEEN: I sure didn't do
17 it.
18 THE COURT: I think the area of
19 inquiry is appropriate on redirect. I'll
20 overrule the objection. You may proceed.
21 Q Would you --
22 A Beginning at the beginning, "Indiana had the
23 seventh highest rate with 20.7 percent of all

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1 deaths blamed on tobacco use. The Centers for
2 Disease Control and Prevention said Indiana had
3 a smoking-related death rate of 394.3 per
4 100,000 people."
5 Q Then, Doctor, I wonder if over in the second
6 column, if you would go down to where it says,
7 "Pressure of another kind..."
8 A This paragraph, "Pressure of another kind led
9 to the nation's lowest smoking-related death
10 rate next door in Utah, just 1,228 people died
11 from smoking in 1990, 13.4 percent of the
12 state's total, for a mortality rate of 218 per
13 100,000 people."
14 Q And then the next paragraph, would you read
15 that for us.
16 A The next paragraph states, "Mormons' account
17 for 70 percent of Utah's population, giving
18 them a huge influence on smoking prevention
19 according to John Brocker (phonetic), the
20 state's director of vital statistics."
21 Q Then, Doctor, you were asked some questions
22 from the Indianapolis Star article of June 15th
23 of 1994 this morning, under the story "City's

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1 Death Rate for Lung Cancer Among the Worst."
2 I'm going to refer you to page 2 of that
3 article and ask you to read the highlighted
4 portion that appears in the same article.
5 A The paragraph begins, "But Homer Twigg,
6 assistant professor at the Indiana University
7 School of Medicine, said smoking remains the
8 main culprit. If you stop smoking and
9 cigarettes were banned, 95 percent of lung
10 cancer would go away."
11 Q You no longer have the 1964 report in front of
12 you, do you, sir?
13 A No, sir.
14 Q Let me just go over here, then, a moment. I'm
15 going to refer you to page 20 of the '64
16 report. Is there a discussion there of the
17 criteria that are set forth in the conclusions
18 reached, they're numbered, I believe, A through
19 E or something like that?
20 A Yes, this section relates to criteria that were
21 used by the committee at that time to form a
22 basis of opinion regarding causality.
23 Q You have reviewed that before, have you not?

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1 A Yes, I have.

2 Q I wonder if you would read that for the jury,

3 please, sir.

4 A Beginning here?

5 Q Yes, sir, please.

6 A The paragraph begins, "Statistical methods

7 cannot establish proof of a causal relationship

8 in an association. The causal significance of

9 an association is a matter of judgment which

10 goes beyond any statement of statistical

11 probability. To judge or evaluate the causal

12 significance of the association between the

13 attribute or agent and the disease or effect

14 upon health, a number of criteria must be

15 utilized, no one of which is an all-sufficient

16 basis for judgment. These criteria include:

17 A, the consistency of the association; B, the

18 strength of the association; C, the specificity

19 of the association; D, the temporal

20 relationship of the association; E, the

21 coherence of the association.

22 "These criteria were utilized in various

23 sections of this report. The most extensive

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1 and illuminating account of their utilization
2 is to be found in Chapter 9, in the section
3 entitled "Evaluation of the Association Between
4 Smoking and Lung Cancer."
5 Q So using those criteria with respect to
6 causality between smoking and lung cancer, the
7 Surgeon General's committee then went on to
8 reach their conclusions on lung cancer and
9 their relationship, did they not?
10 A Yes.
11 Q I wonder if you would refer to page 196. Do
12 you find the conclusion there, sir?
13 A Yes, on page 196, conclusions, No. 1 -- do you
14 want me --
15 Q Please, if you would.
16 A "Cigarette smoking is causally related to lung
17 cancer in men. The magnitude of the effect of
18 cigarette smoking far outweighs all other
19 factors. The data for women, although less
20 extensive, point in the same direction.
21 "No. 2, the risk of developing lung cancer
22 increases with the duration of smoking and the
23 number of cigarettes smoked per day and is

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1 diminished by discontinuing smoking.

2 "No. 3, the risk of developing cancer of

3 the lung for the combined group of pipe

4 smokers, cigar smokers, and pipe and cigar

5 smokers is greater than in nonsmokers but much

6 less than for cigarette smokers. The data are

7 insufficient to warrant a conclusion for each

8 group individual."

9 Q You may keep that up here for now.

10 Doctor, do you remember you were asked

11 questions out of this book, "Tobacco"?

12 A Yes.

13 Q I would leave that there and ask you to refer

14 to various pages.

15 First of all, I wonder if you would turn

16 to the preface.

17 A (Witness complies).

18 Q Would you look at the second paragraph there.

19 A (Nods head affirmatively.)

20 Q Do the authors not acknowledge a grant in aid

21 support from the Tobacco Industry Research

22 Committee during the final stages of this long

23 project?

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1 A Yes, they do.

2 Q Then, Doctor, you remember -- I'm going to ask

3 you to turn to page 526, please, 526.

4 Over on the second column, the first full

5 paragraph that begins in that column, do you

6 recall you were asked this morning to agree

7 whether or not it said there that smoking

8 produces a craving for more when an attempt is

9 made to give it up, isn't that -- J.D. Rallston

10 in 1926, "but it can seldom be accurately

11 described as overpowering and regard -- and to

12 regard tobacco as a drug of addiction may be

13 all very well in a humorous sense, but it's

14 hardly accurate." Do you remember that?

15 A Yes,

16 Q That appears here, doesn't it?

17 A Yes, sir.

18 Q Would you read what appears immediately

19 thereafter that was not read to you?

20 A Yes, sir. "J.D. Rallston (1937 A. and B.) was

21 inclined to regard smoking as an addiction,

22 accepting a recent definition by E.W. Adams

23 that addiction was 'a state of bondage to a

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1 masterful drug manifested by craving,
2 tolerance, intense discomfort of a specialized
3 character on withdrawal of the drug and a
4 tendency to relax.'"
5 Q Then the next line, please.
6 A Next line states, "Most of the writers on the
7 subject have apparently viewed tobacco smoking
8 as both a habit and an addiction, depending
9 upon the individual and upon the character of
10 the abstinence symptoms."
11 MR. SHEFFLER: Your Honor, could
12 we have the rest of the sentence read for
13 clarity?
14 MR. WARREN HOLLAND: Are you
15 questioning now or -- you may read the rest of
16 it.
17 A I'm sorry, I'm sorry, I was wading through,
18 there are all sorts of parens here.
19 Let me begin that again. "Most of the
20 writers on the subject have apparently viewed
21 tobacco smoking as both a habit and an
22 addiction, depending upon the individual and
23 upon the character of the abstinence symptoms."

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1 Then there are a series of references,
2 then semicolon, "Some have considered it purely
3 a habit, some a pure drug addiction. While
4 still others have preferred to go beyond the
5 conventional definitions of habituation or
6 addiction and to regard tobacco smoking from
7 other points of view."
8 Q Then, Doctor, I wonder if you would refer to
9 page 527, please. On the right-hand column,
10 you can start at the beginning of that column,
11 please.
12 A Yes. "Pallu-Strechter," that's a hyphenated
13 name, "reference 1955-1956, preferred to
14 classify drugs as 1, essentially maligned such
15 as narcotics. 2, potentially maligned such as
16 barbiturates and alcohol. And 3, essentially
17 benign such as tobacco."
18 He went on to point out that drugs could
19 be compared according to various different
20 criteria. For instance, in terms of what
21 people will pay to get their drug, narcotics
22 come first, with tobacco a close second.
23 In this connection, the report by Artisan

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1948 on conditions in Germany during 1946-47, when tobacco rations were reduced to about 40 cigarettes a month for men and 20 for women is very pertinent.

"According to Arnitzen, the majority of habitual smokers up to a point prefer to do without food, even under extreme conditions of nutrition rather than to forego tobacco.

"Thus, when food rations in prisoner-of-war camps were down to 900 to a thousand calories, smokers were still willing to barter their food rations for tobacco, and many housewives who were smokers bartered fat and sugar for cigarettes."

Q Then could you continue to read that, please.

A "In disregard of considerations of personal dignity, conventional decorum, and aesthetic hygienic feeling, cigarette butts were picked out of the dirt by people, who, on their own statements, would on any other circumstances have felt disgust at such contact. Smokers also condescended to beg for tobacco but not for other things."

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1 Q I think that's fine. Thank you.

2 And then if you would turn to page 528 of

3 this book, please. At the end of the first

4 paragraph beginning after it says, "A somewhat

5 similar dividing line was drawn by Russ, 1955."

6 If you would read that last sentence there.

7 A The last sentence is in quotes, and it states,

8 "The term 'addict' when applied to a smoker is

9 especially significant when a man goes on

10 smoking in spite of the harm he knows that it

11 is doing him. His need of the drug overrides

12 his knowledge."

13 Q Then if you would turn to page 534, please. Do

14 you see the third paragraph there starting with

15 "Several writers"?

16 A Yes, sir.

17 Q I wonder if you would read that for us, please.

18 A "Several writers have stated or implied that

19 smokers continue to smoke simply to prevent the

20 occurrence of abstinence symptoms. Popularly

21 put, the average smoker smokes because he is

22 uneasy, uncomfortable, sometimes in real

23 distress if he does not smoke. The habitual

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1 smoker suffers all the time, when not under the
2 influence of nicotine, from the damage that
3 smoking has done him. Medically phrased, there
4 is little euphoria in tobacco smoking except in
5 the return to approximate normality in the
6 addict when he indulges." There is a reference
7 from the Medical Journal of Australia in 1939.
8 Q Then if you would turn to page 540, please. At
9 the top of the first column, start where it
10 says, "Head (1939)."
11 A Yes, sir.
12 Q Would you, please, read that.
13 A "Head (1939) gave the following description of
14 events which developed on his temporarily
15 refraining from cigarette smoking. About an
16 hour after smoking the last cigarette, peculiar
17 sensation developed in his mouth. During the
18 second hour he began to be conscious of his
19 legs and arms, in fact, of his whole body. It
20 was not so much a pain as an awareness of every
21 muscle and nerve. This was the true urge to
22 another cigarette that disappeared almost with
23 the first puff.

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1 "On arising in the morning after eight
2 hours of deprivation, his pulse and respiration
3 were slow, blood pressure and basal metabolism
4 low, and salivary secretion markedly increased.
5 He felt apathetic and mentally dull and
6 irritable.
7 "At the end of the first cigarette,
8 respiration, pulse, and blood pressure all rose
9 to normal levels, and the flow of saliva was
10 almost completely stopped. Mental depression
11 disappeared. He felt awake and ready for the
12 day.
13 "After about three days of such effects
14 his head experienced, the average individual
15 can no longer tolerate this change, so he
16 resumes the smoking habit." Reference, Hansel,
17 1954.
18 Q Doctor, I'm going to hand you the 1988 Surgeon
19 General's Report and ask you to refer to page
20 10, please.
21 MR. SHEFFLER: Your Honor, before
22 the question is completed, could we approach
23 the bench for a minute?

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1 THE COURT: Yes, you may approach
2 the bench.
3 (A side bar conference was held outside
4 the presence of the jury.)
5 MR. SHEFFLER: Your Honor, I have
6 two problems with page 10 and the eventual
7 question on this. First of all, this was read
8 during his direct examination, this portion of
9 the 1988 Surgeon General's Report, so it is
10 improper recross -- improper redirect. And
11 secondly, I believe that Mr. Holland has some
12 blowups of this which I do not believe should
13 be used with the jury.
14 MR. WARREN HOLLAND: I'm going to
15 have him read page 10. This was going -- they
16 have gone into the '64, they went back into the
17 '88, and I think he has a right to come back
18 and discuss page 10. It has clearly been
19 raised by cross.
20 THE COURT: Well, he says that
21 you read it in on direct.
22 MR. WARREN HOLLAND: Sure, but, I
23 mean, they went back and went further on it in

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1 cross, and this also goes to the '64, they did
2 a song and dance for hours.
3 MR. SHEFFLER: But this very
4 section was read on direct about the '88
5 report. The '88 report's characterization of
6 the '64 was read on direct, and it's improper
7 redirect.
8 THE COURT: This is clearly
9 cross-examination, far exceeded the bounds of
10 direct examination.
11 MR. SHEFFLER: Your Honor, the
12 point being, your Honor, I don't think it's a
13 proper redirect to read the same thing that the
14 witness has testified on direct. It's the same
15 exact stuff. Saying it twice.
16 THE COURT: The objection is you
17 plan to do the same, read exactly the same
18 stuff?
19 MR. WARREN HOLLAND: No, I was
20 going to have it apply to or respond to
21 cross-examination.
22 THE COURT: If the application
23 was brought up on cross-examination, it is

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1 appropriate. He also brought up the issue of
2 the blowups. Are the blowups also page 10?
3 MR. WARREN HOLLAND: Yes.
4 THE COURT: Is this this issue of
5 demonstrative evidence again?
6 MR. WARREN HOLLAND: It's not
7 being offered.
8 MR. SHEFFLER: Your Honor, your
9 Honor, in this instance, I think it is
10 inappropriate to use as demonstrative evidence,
11 these blowups.
12 THE COURT: (Unintelligible.)
13 MR. WARREN HOLLAND: This is
14 rehabilitation, same deal as impeachment.
15 THE COURT: Is it a blowup of
16 page 10?
17 MR. WARREN HOLLAND: Yes.
18 MR. SHEFFLER: Your Honor, as we
19 talked the other day, you said that the
20 demonstrative should be shown at least 48 hours
21 in advance. We showed them 48 hours in advance
22 what we were using on cross which was the
23 blowup over here.

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1 THE COURT: This is where my --
2 this is what I -- is rehab like impeachment in
3 reverse?
4 MR. SHEFFLER: We lost that
5 argument, your Honor.
6 THE COURT: No, I thought you won
7 it. You won, because what you said was this
8 is -- you won it, because what you said was
9 this is not substantive evidence, this is an
10 issue of impeachment. This is contradicting
11 what the witness testified, and I agreed with
12 you.
13 MR. SHEFFLER: Right, and this
14 certainly is impeachment.
15 THE COURT: My question, then, is
16 rehabilitation the opposite of -- I think it's
17 appropriate to go into. Obviously at the time,
18 I guess it seemed that it was the content of
19 the (unintelligible) mean, but then how much is
20 too much. Obviously, all this page, a lot was
21 gone into on cross. I think Warren has a right
22 to reasonably go into it again on redirect, and
23 I assume we'll have some more about recross

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1 that deals with it as well. I think so far it
2 hasn't (intelligible) but keep it in balance,
3 okay?
4 (End of side bar conference.)
5 QUESTIONS BY MR. WARREN HOLLAND:
6 Q I wonder if you would refer to page 10, and
7 I'll show you this blowup. Does that appear to
8 be a blowup of page 10?
9 A Yes, sir.
10 Q Why don't you, if you don't mind, step down
11 here, and maybe the jury can follow it better
12 if you would just -- maybe I can get this over
13 here.
14 Will this assist you, Doctor, in putting
15 in perspective some of the questions you were
16 asked on cross-examination with respect to what
17 the Surgeon General found in '64 and prior
18 years before and after that literature?
19 A I believe so.
20 Q If in any way you want to use this, please. If
21 you would go ahead and read that.
22 A "Since the late 1800s, research on the
23 pharmacologic actions of nicotine has

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1 contributed substantially to basic information
2 about the nervous system. The classic work by
3 Langley and Dickinson in 1889 on nicotine's
4 effect in autonomic ganglia led to the
5 postulates that chemicals transmit information
6 between neurons and that there are receptors on
7 cells that respond functionally to stimulation
8 by chemicals, specific chemicals.
9 "As early as the 1920s and 1930s, some
10 investigators were concluding that nicotine was
11 responsible for the compulsive use of tobacco
12 products." Armstrong, Jones, 1927. Dorsey,
13 1936, Lewin, 1931.
14 Johnston, 1942 concluded that "Smoking
15 tobacco was essentially a means of
16 administering nicotine just as smoking opium is
17 a means of administering morphine."
18 Throughout the 20th century, research has
19 continued to investigate the role of nicotine
20 and tobacco use. The 1964 report of the
21 Surgeon General's Advisory Committee on Smoking
22 and Health, U.S. Public Health Service, 1964,
23 held that "The habitual use of tobacco is

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1 related to primarily to psychological and
2 social drives reinforced and perpetuated by the
3 pharmacologic actions of nicotine on the
4 central nervous system. Nicotine-free tobacco
5 or other plant materials do not satisfy the
6 needs of those who acquire the tobacco habit.
7 "The 1964 report relying on a distinction
8 (that is no longer made) between habituating
9 and not addicting" -- I'm sorry, "between
10 habituating and not addicting. The distinction
11 in 1964 between habituating drugs (including
12 cocaine and amphetamines) and addicting drugs
13 (including opiates and barbiturates) was based
14 on, No. 1, whether the drug produced clear
15 physical dependence; 2, whether damage was
16 mainly to the individual user (habituating
17 drugs) or to behavior that developed" -- I'm
18 sorry -- "or to society." It's hard to read at
19 an angle, here. "(Addicting drugs). And 3, to
20 the strength of the habitual behavior that
21 developed.
22 "There was no question at the time of the
23 1964 report that nicotine was the critical

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1 pharmacologic agent for tobacco use, but its
2 role was then considered to be more similar to
3 cocaine and amphetamines than to opiates and
4 barbiturates.
5 Q Does it continue --
6 A "Later" -- and that ends that page.
7 "Later in 1964 the World Health
8 Organization dropped this semantic distinction
9 between habituating and addicting drugs because
10 it was recognized that habitual use could be as
11 strongly developed for cocaine as for morphine,
12 that social damage generally accompanied
13 personal damage, and that behavioral
14 characteristics of drug use could be similar
15 for the so-called habituating and addicting
16 drugs.
17 "In an effort to shift the focus to
18 dependent patterns of behavior and away from
19 moral and social issues associated with the
20 term 'addiction,' the term 'dependence' was
21 recommended."
22 Q Do you want to step back, please? Thank you.
23 If you would hand me that, please, Doctor.

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1 Then, I believe the next two paragraphs were
2 gone into, also. I think it's important if you
3 would read those, please.
4 A Beginning?
5 Q Beginning with right there, that paragraph.
6 A It is --
7 MR. HARDY: Page, could we have a
8 page reference?
9 Q Page 11, I guess.
10 A Page 11 in the 1988 report. "It is now clear
11 that even by the earlier distinction in
12 nomenclature, cigarettes and other forms of
13 tobacco are addicting and actions of nicotine
14 provide the pharmacologic basis of tobacco
15 addiction. The term 'dependence-producing,'"
16 and that's in quotes, "the term
17 'dependence-producing' may also be used to
18 describe cigarettes and other forms of tobacco
19 use, analogous to actions of other drugs, e.g.,
20 opiates, cocaine.
21 "Since 1964, considerable additional
22 evidence has been compiled that substantiates
23 these conclusions. The present report reviews

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1 this information and the relevant literature.
2 (Previous Surgeon General's Reports provided
3 current views of health consequences of
4 cigarette smoking particularly relevant to
5 public health. For example, despite the
6 accumulating evidence in the early 1960s, there
7 was little recognition by the public of the
8 health hazards of smoking.
9 "Each report examines specific information
10 considered to be important for public
11 dissemination. A brief review of topics
12 addressed in these reports provides the
13 background for the present report."
14 Q I believe that's sufficient, Doctor. Then,
15 Doctor, I wonder if you would turn to page 9
16 and read the major conclusions of the 1988
17 Surgeon General's report.
18 A On page 9, "Major Conclusions. No. 1,
19 cigarettes and other forms of tobacco are
20 addicting. 2. Nicotine is the drug in tobacco
21 that causes addiction. 3. The pharmacologic
22 and behavioral processes that determine tobacco
23 addiction are similar to those that determine

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1 addiction to drugs such as heroin and cocaine."
2 Q Okay. Thank you. Then I'm going to hand you
3 the 1989 Silver Anniversary Surgeon General's
4 report. I'll ask you to turn to page 43. And
5 if you would read the first paragraph of that
6 report.
7 A It's entitled "Lung Cancer." "Introduction.
8 One of the most prominent conclusions of the
9 1964 report was the determination that
10 'Cigarette smoking is causally related to lung
11 cancer in men. The magnitude of the effect far
12 outweighs all other factors. The data for
13 women, though less extensive, point in the same
14 direction.'
15 "The epidemiologic evidence available in
16 1964 on smoking and lung cancer was already
17 extensive. Sharply increasing lung cancer
18 mortality rates in the United States across the
19 20th century provided indisputable
20 documentation of a new epidemic.
21 "Clinical observations and early
22 epidemiologic findings suggested that tobacco
23 smoking was associated with lung cancer, but

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1 hypotheses related to air pollution,
2 occupation, and other factors were also extant.
3 "By 1964, however, the epidemiologic data
4 derived from 29 retrospective and seven
5 prospective studies were conclusive. Smoking
6 was causally related to lung -- to cancer of
7 the lung.
8 "Further support for this conclusion was
9 obtained from animal studies showing that
10 condensates of tobacco smoke were carcinogenic
11 and from demonstration that tobacco smoke
12 contained carcinogens. Reference U.S.
13 Department of Health and Human Services, 1982.
14 "The evidence compiled through 1964 also
15 provided additional insight into quantitative
16 aspects of respiratory carcinogenesis like
17 tobacco smoke. The risk of lung cancer was
18 shown to increase with the amount and duration
19 of smoking and to decline with cessation of
20 smoking."
21 Q Then page 5 -- are you holding up okay?
22 A Yeah, my voice isn't.
23 Q Do you need some water? I've got some water.

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1 A No, I've got some.
2 Q I wonder if you would start with the second
3 paragraph and read through that paragraph
4 there.
5 MR. SHEFFLER: What page?
6 Q Page 5.
7 A Page 5, "Historical Perspective." Right here?
8 Q Yes.
9 A "Although the health hazards of tobacco use
10 have been suspected for almost 400 years, the
11 first reported clinical impressions of a
12 relationship between tobacco and disease date
13 from the 18th century, when tobacco use was
14 associated with lip cancer, Reference U.S.
15 Department of Health, Education and Welfare,
16 1979(A), and nasal cancer, U.S. Department of
17 Health and Human Services 1986(B). However" --
18 Q 1986?
19 A 1986(B). "However, true scientific
20 understanding of the health effects of tobacco
21 has been achieved only in the present century.
22 Broders (phonetic), 1920, published an article
23 in the Journal of the American Medical

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1 Association linking tobacco use to lip cancer,
2 and eight years later Lombard and Deering,
3 1928, published an article in the New England
4 Journal of Medicine noting that heavy smoking
5 was more common among cancer patients than
6 among control groups. Later, Pearl, in 1938,
7 observed in the Journal of Science that heavy
8 smokers had a shorter life expectancy than
9 nonsmokers.
10 "During the 1930s the nation's increasing
11 rate of lung cancer and other diseases prompted
12 the initiation of epidemiologic and laboratory
13 studies, the relationship between tobacco use
14 and disease. In the late 1940s and early 1950s
15 a number of retrospective epidemiologic studies
16 published by Wynder and Graham in 1950 and by
17 other investigators provided scientific
18 evidence strongly linking smoking to lung
19 cancer.
20 "This association was soon thereafter
21 supported by the emerging early findings of
22 major prospective (cohort) mortality studies,
23 including the work of Doll and Hill, 1954 and

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1 1956 in Great Britain, and Hammond and Horn,
2 1958(A), 1958(B) in the United States.
3 "The strength and consistency of these
4 results combined with evidence from laboratory
5 and autopsy studies led a national scientific
6 study group to conclude in 1957 that the
7 relationship between smoking and lung cancer
8 was causal. (Study group on smoking and
9 health, 1957).
10 "On July 12th of that year, U.S. Surgeon
11 General Leroy Burney issued a statement
12 declaring that 'The public health service feels
13 the weight of evidence is increasingly pointing
14 in one direction, that excessive smoking is one
15 of the causative factors in lung cancer.' U.S.
16 Public Health Service, 1964.
17 Two years later, in 1959, Surgeon General
18 Burney said that 'The weight of evidence at
19 present implicates smoking as the principal
20 factor in the increased incidence of lung
21 cancer.' Burney, 1959."
22 Q That was five years before the publication of
23 the 1964 Surgeon General's Report?

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1 A Yes, sir.

2 Q Doctor, you were asked, it seems like a long

3 time ago, on cross-examination Friday, whether

4 you had reviewed the deposition of the

5 plaintiff. Do you recall that?

6 A Yes, sir.

7 Q And you have reviewed, as I understand it, the

8 video deposition?

9 A Yes.

10 Q And did you have available to you the summaries

11 of the discovery deposition of the plaintiff?

12 A Yes, I did.

13 Q Was there, upon reviewing the video deposition

14 and the summaries of the discovery deposition,

15 any information that you felt that you wanted

16 that was not available?

17 A No, sir.

18 Q How would you characterize those summaries of

19 the discovery depositions that were given to

20 you as far as completeness?

21 A Well, voluminous. And complete, from my

22 perspective, of trying to address the clinical

23 significance of the issues being raised.

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1 Q Do you recall that, so that there is no
2 misunderstanding, on the video deposition, I
3 believe you indicated that you were asked
4 whether or not there were any questions by
5 defense lawyers; do you remember that?
6 A Yes, sir.
7 Q And indeed, have you ascertained that the
8 defense lawyers were present, indeed?
9 A Yes.
10 Q And that they even asked a few questions and
11 then deferred any further cross-examination,
12 relying on each other?
13 A That's my recollection, correct.
14 Q It wasn't some home video that we did with
15 Mr. Rogers?
16 A Correct.
17 Q Does a person who quits smoking ever return to
18 the level of a nonsmoker with respect to his
19 risk of lung cancer?
20 A To my knowledge, the answer is no. The risk
21 decreases, and we encourage patients,
22 obviously, and try to help them quit because we
23 know that the risk of various diseases,

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1 cardiovascular and other ones, and lung cancer
2 in particular, decrease following cessation of
3 smoking.
4 But the data I'm familiar with indicate
5 that if you track that out in former smokers,
6 that at about 15 to 20 years following
7 cessation of smoking, the risk of lung cancer
8 plateaus, but it is still in most studies
9 approximately twice the risk that it is in
10 life-long nonsmoking control populations.
11 So that the good news is the overall risk
12 drops from way up here to way down here, but
13 it's still approximately twice the risk that
14 you would find in a life-long nonsmoking
15 population of people.
16 Q Doctor, you recall that on Friday you discussed
17 at some length these drawings of the x-ray of
18 Mr. Rogers?
19 A Yes.
20 Q You were asked on cross-examination whether or
21 not, indeed, these were drawn to scale; is that
22 correct?
23 A Yes.

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1 Q Have you had an opportunity to rethink that and
2 determine whether or not they were?
3 A Yes, they were.
4 MR. McELVEEN: Objection, that's
5 a leading question.
6 THE COURT: Have you had a chance
7 to rethink?
8 MR. McELVEEN: Have you had a
9 chance to rethink?
10 MR. WARREN HOLLAND: I'll
11 withdraw it, your Honor.
12 THE COURT: Okay.
13 Q Are they drawn to scale?
14 A Yes, they were.
15 Q Do you know the procedure that was utilized to
16 assure that was drawn to scale?
17 A They based the abnormality that was present on
18 the chest x-ray and on the CT scan, obtained a
19 drawing precisely from the abnormal image that
20 appears on those films onto a sheet of paper,
21 as I understand it, and then that is magnified,
22 or it's reduced, depending on what they need it
23 for. So that the proportion of size of the

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1 abnormality as it existed on the x-ray to the
2 surrounding structures is maintained.
3 MR. McELVEEN: Judge, I would
4 object and move all that be stricken as
5 hearsay.
6 THE COURT: Unless there's some
7 foundation, I see no foundation for it. So
8 ordered.
9 Q Doctor, did you request these drawings to be
10 done?
11 A Correct.
12 Q Were they done at the Indiana University
13 Medical Illustrator?
14 A Yes, they were.
15 Q For instance, when you order x-rays under your
16 direction and control, do you then depend on
17 what's told to you by the radiologist, in part
18 at least, before you review them?
19 A Absolutely, yes, sir.
20 Q That would be the same thing you would do here
21 is rely on the medical illustrator at the
22 Indiana University Medical Center?
23 A These are highly trained and talented medical

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1 illustrators who routinely do this kind of
2 thing for textbooks, scientific publications,
3 manuscripts, formal scientific presentations at
4 national scientific assemblies. So it's part
5 of their training and part of their practice.
6 Q Indeed, a small part of their practice would
7 have to do with forensics?
8 A Correct.
9 MR. McELVEEN: There again,
10 Judge, the illustrator is not on the witness
11 stand. This is everything --
12 THE COURT: There's no question
13 pending before the witness.
14 MR. WARREN HOLLAND: What I'm
15 saying is I've asked that the -- I'll ask him a
16 question.
17 Q So, indeed, they were drawn to scale, and you
18 have ascertained that?
19 A Yes.
20 MR. McELVEEN: Objection. The
21 illustrator is not on the witness stand.
22 Everything he is saying is hearsay.
23 THE COURT: The question was, has

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1 he ascertained they were drawn to scale. And
2 he said yes.
3 MR. McELVEEN: He did that,
4 according to him, by asking the illustrator who
5 is not here.
6 MR. WARREN HOLLAND: Who drew
7 these under his direction and control.
8 THE COURT: Overrule the
9 objection.
10 Q Okay. Doctor, you were asked a good number of
11 questions about the -- from the x-rays, okay,
12 you remember you stood up there and were asked
13 questions with respect to whether you could
14 tell whether or not it was in the lung or out
15 of the lung?
16 A Yes.
17 Q And, indeed, the drawing was drawn in part to
18 illustrate the location of the size and makeup,
19 an x-ray more understandable; is that correct?
20 A Yes.
21 Q Do you feel that on the basis of the
22 examination which you have undergone, that it's
23 important in order that the jury really

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1 understand what goes on and what you think went
2 on in this bronchoscopy, to explain a little
3 further to them about that?
4 A That was an issue, a point that was raised and
5 a question, and several questions surrounded
6 that. I can certainly and am prepared to
7 explain that, to clarify that, if that is the
8 question.
9 Q Have you reviewed the bronchoscopy report?
10 A Yes, I have.
11 Q Would it help you to use a model or a diagram
12 of the lung and show?
13 A That would be fine.
14 Q I am going to give you your choice which of
15 these you would like to use to best illustrate
16 this.
17 A This one right here (indicating).
18 (A discussion was held off the record.)
19 Q Doctor, I will give you these pens. I'm going
20 to show you first, Doctor, you've seen the
21 bronchoscopy report. Does this appear to be a
22 blowup of that?
23 A Yes, it is.

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1 Q What I'll do is kind of serve as an easel
2 myself, so if at any point in your discussion
3 you want to refer to it, I'll hold it.
4 A Well, this is a blowup of the operative summary
5 procedure performed by Dr. Daniels on Richard
6 Rogers, date 8/15/86.
7 MR. HARDY: Excuse me, your
8 Honor, what is the question? I don't think
9 there's a question pending.
10 Q I wonder, Doctor, if you would refer to the
11 bronchoscopy report and then to the drawing and
12 then tell the jury, please, what was going on.
13 A The report --
14 MR. HARDY: Excuse me just a
15 minute, Doctor. I object to this entire line
16 of questioning. This is a summary of the
17 witness's direct examination and illustrations
18 to the jury and what he's doing now is simply
19 repeating it all and I submit it is improper
20 redirect.
21 MR. WARREN HOLLAND: He's going
22 in to explain things that he raised on
23 cross-examination and show how all this is

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1 consistent.

2 THE COURT: Overrule the

3 objection. You may continue.

4 A The issue, to be specific, was some question as

5 to the origin of the lung cancer. And so what

6 I'll try to do is orient you to where the

7 fiberoptic bronchoscope, this is a tube about

8 this size, was placed into the lung and this

9 just describes how that was done.

10 At this point I draw your attention, the

11 scope, this is the fiberoptic bronchoscope, was

12 then advanced into the right main stem bronchus

13 which appeared to be normal. This is the

14 trachea, and the scope then would be passing

15 down like so (indicating) inside of this

16 structure and into this position which is the

17 right main stem bronchus. This is the left

18 main stem bronchus, this is the right main stem

19 bronchus, and it appeared to be normal,

20 although there was some lateral indentation, an

21 edema along that wall. By lateral indentation,

22 the bronchoscopist by his description was

23 viewing something that was pushing in at this

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1 point, so he saw the lateral wall of that right
2 main stem bronchus pushing in and describes
3 that as lateral indentation.
4 In addition to that, there was edema,
5 which means there was water in the wall, if you
6 will, of the airway that the bronchoscopist was
7 observing. The scope was then advanced into
8 the right upper lobe bronchus. The segmental
9 bronchi could not be visualized. The
10 bronchoscopist now has moved past the right
11 bronchus, which is here, has then moved into
12 this position, which is at the mouth, if you
13 will, the orifice of the right upper lobe of
14 the bronchus, this bronchus here serving the
15 upper part of the lung.
16 The bronchoscopist is describing a very
17 abnormal finding at this point which is in the
18 lung, and that is that the segmental bronchi
19 could not be visualized. The segmental bronchi
20 are the bronchi that the bronchoscopist sees
21 out in the distance and these are the bronchi
22 that serve this upper lobe.
23 So what he is saying is he could not

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1 see -- the segmental bronchi could not be
2 visualized, which is a very abnormal finding.
3 There was only a very small opening in the
4 right upper lobe bronchus with extrinsic
5 compression and marked edema in that area.
6 That means he saw a little slit of some sort, a
7 small opening in the right upper lobe bronchus
8 and there was evidence of extrinsic
9 compression, and what that means when you're in
10 looking at the airway, there is evidence that
11 something is pushing down on the wall of that
12 airway. That's what the bronchoscopist is
13 describing here. And marked edema, which again
14 means what I mentioned earlier.
15 Several biopsies were taken and washings
16 and so on done. This would be a rather typical
17 description and a procedure at this point
18 because you're sitting here with the
19 bronchoscope looking at the abnormalities and
20 then at this point with the scope there, you
21 put down a biopsy forceps through the scope and
22 take washings from this area.
23 So to do that, you would extend the biopsy

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1 forceps out past the end of the scope, into one
2 of these segmental areas that again are closed,
3 but what you would do is push them out, take a
4 biopsy and then pull that back and then the
5 tissue is put in a special container to
6 preserve it, and then that's taken to the
7 pathology laboratory where they section it and
8 look at it under the microscope.
9 The washings were also obtained. All that
10 means is with the bronchoscope at that point
11 you would flush some solution, usually a warm
12 saline solution down, and then you suction that
13 back hoping to retrieve the malignant cells
14 from that region of the lung.
15 The scope was then advanced into the
16 bronchus intermedius, which just means the
17 operator finished that procedure and then for
18 completeness went down in to examine and
19 explore other areas of the lung. The bronchus
20 intermedius is here (indicating), and there was
21 a mucosal expressance along the lateral wall of
22 the bronchus intermedius, the middle lobe, the
23 lower lobe and the respective segmental bronchi

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1 were widely patent. That just means that when
2 he went down and looked at the middle lobe over
3 here and the lower lobe bronchi down here,
4 everything he could see was open. By patent,
5 he means that the airways were open as opposed
6 to closed.
7 This portion of the procedure was then
8 terminated and specimens were sent to the
9 laboratory for cytology, which is cancer cell
10 processing, AFB stands for acid fast bacilli,
11 that's tuberculosis, fungus and routine culture
12 and sensitivity. I think those are the
13 salient --
14 Q What was the preoperative diagnosis?
15 A The preop diagnosis before performing this
16 procedure was right upper lobe lung tumor and
17 right scalene lymphadenopathy. The scalene
18 node is a particular lymph node, and
19 lymphadenopathy means an enlargement of the
20 lymph node like you have an enlargement of one
21 of the nodes up here.
22 Q What was the postoperative diagnosis?
23 A Postoperative diagnosis was small cell

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1 carcinoma, the right upper lobe, with
2 metastasis to the right scalene lymph node.
3 Q Doctor, after reviewing the report and
4 describing its -- the operation of a
5 bronchoscopy to the Court and jury, do you have
6 an opinion as to the location of the mass
7 reflected on the x-ray as to whether it was in
8 or out of the lung?
9 A Well, it was clearly what we would call
10 intraparenchymal, and that would mean that the
11 lining of the airways from which the biopsies
12 were taken inside the lung showed small cell
13 undifferentiated cancer. These biopsy forceps
14 are very small, tiny little biopsy forceps.
15 You open them up and the -- even wide open,
16 they're designed to take a piece of tissue that
17 would be in the range of about a millimeter,
18 two millimeters. Occasionally if you really
19 get a good biopsy, you might get back a biopsy
20 that's a little bit bigger than that, but we're
21 talking about a very small piece of tissue.
22 That means the bronchoscopist took those
23 biopsies from that area of the lung and the

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1 lining, mucosa of the lung, showed small cell
2 cancer.
3 In addition, the node biopsy, that
4 procedure was done not at the same time, but
5 following the bronchoscopy, revealed tumor, and
6 again the same type of tumor, which was small
7 cell cancer.
8 MR. HARDY: Your Honor, again, I
9 object. I don't want to be rude, keep
10 interrupting the doctor's testimony. I would
11 like to have a continuing objection to this
12 entire line of testimony. He has just finished
13 testifying almost precisely the way he did on
14 direct examination about the bronchoscopy and
15 the tissue biopsy. He simply repeated his
16 testimony, and I submit it is improper redirect
17 examination.
18 THE COURT: So noted. Overruled.
19 Next question, please.
20 Q Doctor, you were asked questions upon
21 cross-examination with respect to whether or
22 not there was any notation of inflammatory
23 changes on the bronchoscopy report; do you

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1 recall that?

2 A Yes, I do.

3 Q Can you tell us whether or not you can tell

4 from the bronchoscopy report whether or not

5 there were, indeed, any such changes?

6 A I do not remember any reference to inflammatory

7 changes in the airways at the time of this

8 procedure.

9 Q Would that in any way affect your opinion or

10 have you changed your opinion with respect to

11 whether or not Mr. Rogers indeed suffered from

12 chronic bronchitis?

13 A Wouldn't change it at all.

14 Q Would you explain why?

15 A Well, I believe as I had mentioned earlier, the

16 chronic tobacco smoking, clearly this is sort

17 of dose related, and that is the more you

18 smoke, the more you will find these changes,

19 produce chronic -- produce bronchitis, which

20 can be while you're smoking seen, not always,

21 not in a hundred percent of cases, but

22 frequently when we put the scope down, we'll

23 see the erythema, the redness, and we'll see

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1 increase in the airway secretions and the
2 secretions will be abnormal, that is they'll be
3 sort of thick and what we call tenacious or
4 stringy. That appearance is characteristic of
5 bronchitis, which is characteristic and found
6 frequently in chronic cigarette smokers. If
7 you stop smoking, those changes resolve.
8 And so that it would not be uncommon to
9 see an airway of a chronic smoker sometime
10 after smoking cessation really look pretty much
11 the way you would expect the airway to look.
12 The intense irritation of the daily smoking has
13 disappeared and the resolution of the
14 bronchitis occurs over a period of days to
15 perhaps weeks. There is some variation there,
16 but the answer to your question is I would not
17 be surprised at that finding in this case.
18 Q Do you have an opinion -- well, let me ask
19 this. Withdraw that question.
20 I'm going to ask you to assume at a given
21 point in time, Mr. Rogers started smoking "low
22 tar, low nicotine cigarettes."
23 Do you have an opinion as to whether or

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1 not that change would have removed the risk of
2 lung cancer?
3 A I do have an opinion, and it would not.
4 Q Can you tell us why?
5 A Well --
6 MR. McELVEEN: Excuse me, Doctor.
7 Let me just pose an objection. This is
8 certainly outside the scope of direct
9 examination or cross.
10 THE COURT: Any response?
11 MR. WARREN HOLLAND: His smoking
12 habit was clearly gone into on cross and
13 direct, your Honor, and with respect to how
14 much he smoked --
15 THE COURT: I agree. Overrule
16 the objection. You may testify, please.
17 A The cigarettes that would be labeled and --
18 would you use those terms again?
19 Q Low tar, low nicotine.
20 A Low tar, low nicotine. I think you used
21 quotation marks around those, but.
22 Q Yes.
23 A I guess my understanding is that people who are

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1 addicted to cigarette smoke will try to
2 maintain or attempt to maintain a given level
3 of nicotine in their system, in their body, to
4 achieve the effects that were achieved with the
5 higher nicotine tobacco levels, so that by
6 reducing nicotine somewhat in no way means that
7 you would decrease the exposure of the person
8 to the tobacco smoke, which contains
9 carcinogens. That's point one.
10 Point two is that despite the fact that
11 cigarettes that do have lower amount of tar in
12 them have been produced, to my knowledge, the
13 data suggests only a modest, at best,
14 alteration in risk of cancer in people who are
15 followed for ample periods of time having
16 smoked those cigarettes.
17 So I guess the short answer is that
18 switching to those types of cigarettes would
19 have been unlikely to influence his risk of
20 subsequently developing lung cancer.
21 Q You were asked on cross-examination whether or
22 not nicotine occurs naturally in tobacco; do
23 you recall that?

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1 A Yes, I do.

2 Q And I believe you indicated that it does?

3 A Yes.

4 Q Does it necessarily -- is it a necessary

5 constituent of a cigarette?

6 A Well, my understanding of that is that --

7 MR. McELVEEN: Judge, I object.

8 I don't think there's any foundation been laid

9 for his testimony as to what are the necessary

10 or unnecessary constituents of cigarettes. He

11 has testified that he hasn't any expertise in

12 cigarette design and manufacture; as a matter

13 of fact, I think he specifically said that he

14 did not.

15 MR. WARREN HOLLAND: I don't

16 think it has anything to do with designs of

17 cigarettes or cigarette engineering. He was

18 asked this question on cross-examination as to

19 whether or not it's a natural constituent of

20 nicotine. I think this is simply a discussion

21 of whether or not that is necessarily so when

22 it is a constituent of smoke, a product.

23 MR. McELVEEN: Well, if I may,

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1 your Honor, I don't mean to make a speaking
2 objection. He said, I believe, in response to
3 my question, it was a natural component of
4 tobacco, and tobacco is -- if a cigarette is
5 rolled tobacco, and I think he's already
6 answered the question.
7 MR. WARREN HOLLAND: I think
8 redirect, I think he just proved exactly why
9 you have to go into this. He just said it's
10 rolled tobacco, which implies they can't do
11 anything about it.
12 THE COURT: My problem, I guess,
13 is that notwithstanding that this doctor has
14 been on the stand now for two days, I don't see
15 the basis -- and maybe it's there -- that would
16 permit him the foundation to answer this type
17 of question.
18 MR. WARREN HOLLAND: You're not
19 saying it's beyond the scope, simply you don't
20 see the foundation?
21 THE COURT: No, I don't think
22 it's beyond the scope at all. The other part,
23 I think the original portion of the objection

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1 was foundation, and to that it's well taken.
2 I'll sustain on that basis.
3 Q Let us probe further, Doctor. You have
4 reviewed -- ask it this way: Have you reviewed
5 literature with respect to the ability of the
6 cigarette manufacturers to reduce or remove
7 nicotine from their cigarettes?
8 A Yes, I have.
9 Q Has this been a part of your ongoing study and
10 interest in the whole field of tobacco smoking
11 and health?
12 A I think it's just a common part of the
13 literature that one who's interested in this
14 reviews, and I've reviewed it.
15 Q Not just for this case, but on an ongoing
16 basis?
17 A Correct.
18 Q Doctor, do you have an opinion as to whether or
19 not tobacco is a necessary constituent of
20 cigarettes as manufactured -- nicotine, I'm
21 sorry.
22 A Whether nicotine?
23 Q Let me restate it.

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1 Do you have an opinion whether or not
2 nicotine is a necessary constituent of
3 cigarettes as manufactured?
4 A I think the literature shows pretty clearly
5 that if you remove nicotine from cigarettes,
6 people won't smoke it. I think the literature
7 clearly shows that if you put it back, they
8 will, or if you allocate chronic smokers to
9 nicotine versus de-nicotinized cigarettes, that
10 one shows that those chronic smokers who are
11 smoking de-nicotinized cigarettes don't like
12 it. So I'm not familiar with all of the
13 literature, but I am familiar with those
14 findings that date back I think well into the
15 1940s.
16 Q Doctor, on the basis of your review of the
17 literature and the publications in this whole
18 field, do you feel that you have the basis to
19 give an opinion with respect to whether or not
20 the cigarette manufacturers have the ability
21 and have had the ability for some time to
22 reduce or remove nicotine from cigarettes?
23 A Yes, I do.

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1 Q What is that opinion?

2 MR. McELVEEN: Judge, before he

3 expresses that opinion, I certainly don't think

4 the proper foundation has been laid for that

5 response. And I would note a lack of

6 foundation.

7 THE COURT: I guess I'm at the

8 same point. The question is do you feel you

9 have the basis to give an opinion with respect

10 to whether or not the cigarette manufacturers

11 have the ability and have had the ability for

12 some time to reduce or remove nicotine from the

13 cigarettes. I'm at the same point --

14 MR. WARREN HOLLAND: Let me break

15 it down. I think it's a double question.

16 THE COURT: Again, I'm lacking in

17 the foundation.

18 MR. WARREN HOLLAND: I think the

19 previous question, your Honor, I asked him

20 about his research and study.

21 THE COURT: If he's read some

22 literature. I am saying that that's

23 insufficient, I think, to answer this question,

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1 but you may question further.

2 Q Doctor, have you had occasion to review

3 internal documents of any of the cigarette

4 manufacturers with respect to their ability to

5 remove nicotine?

6 A Yes, I have.

7 Q And do you recall the approximate date when

8 that was generated, that literature?

9 A The date I'm familiar with is back in the

10 1940s.

11 Q And, in other words, this was what they were

12 saying about their ability, right?

13 A Well, I'm thinking about reports right now

14 where nicotine was taken out of tobacco and

15 cigarettes prepared accordingly, and using

16 various techniques, steam distillation and

17 other techniques, so I guess that's what I'm

18 thinking of right now.

19 Q That was back in the '40s?

20 A As I recollect.

21 Q Doctor, on both direct and cross-examination,

22 you discussed motivation as being important for

23 a person to quit smoking.

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1 A Yes.
2 Q That certainly is true, isn't it?
3 A Yes, it is.
4 Q Is it your opinion whether -- do you have an
5 opinion whether all persons who are motivated
6 who are addicted, are dependent upon
7 cigarettes, can quit?
8 A Well, people may be motivated to quit, but
9 those dependent may or may not be able to quit.
10 Many are not. So we try to encourage their
11 motivation and support them and pat them on the
12 back and help them and we're as positive as
13 possible in supporting their attempts. But
14 whether they're able to quit or not independent
15 of motivation is something we see some that are
16 and some that just can't remain abstinent from
17 cigarettes.
18 Q Does the fact that you were asked upon
19 cross-examination that -- whether the fact that
20 Mr. Rogers had gone to I believe it was one
21 group smoking cessation program and did not
22 remain, or completed the program. Let's assume
23 that in this question as a fact, assume that's

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1 true.

2 Would that in any way change your opinion

3 that I believe you previously expressed that he

4 was motivated?

5 A Well, judging from the videotape, the

6 deposition and the material that I reviewed

7 that you alluded to earlier, I think it -- in

8 Mr. Rogers' case, it seemed to me that his

9 actions, that of going to the clinic, reflected

10 a lot of willpower and motivation to, as is --

11 as I understand, an independent kind of

12 individual, to get up and go do that and be

13 with a group of people who shared that problem.

14 So most people we know do not like to go

15 to those group sessions to try to help with

16 their habit. And I think just from

17 understanding Mr. Rogers' situation, that the

18 fact that he did reflected considerable

19 motivation on his part and demonstrated a real

20 concern and commitment to try to quit.

21 Q You were asked on cross-examination at some

22 length about the fact that you tell people who

23 come to you, you can quit, you can do it, that

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1 type of thing.

2 A Yes.

3 Q Why do you do that?

4 A Well, I couldn't visualize myself saying you

5 can't quit. I guess that's just my nature.

6 And I want to be positive and supportive,

7 because we do know that some people can do it.

8 Once they think about it and become committed

9 and engage in a discussion with a physician,

10 they can quit. They're motivated and they can

11 quit. So I would never tell a patient that you

12 couldn't -- you can't quit.

13 Q When you're motivating a patient in your

14 office, is that different than discussing your

15 opinion as to the -- whether or not cigarette

16 smoking is an addiction and some people can't

17 quit? In other words, are there two different

18 settings in which you're giving those opinions?

19 A I'm not sure if I understand.

20 Q In your office you tell them they can quit

21 because you want them to believe they can.

22 A Right.

23 Q When you're discussing that scientifically as

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1 to whether or not some people can quit, is that
2 a different setting and different direction?
3 A Well, it is. We know statistically that it's
4 going to be very difficult, that a few are
5 going to be able to quit. You tell them to
6 stop and they can stop. But we know based on
7 data from last year that approximately 20
8 million Americans tried to quit and we're
9 familiar with about three percent, two and a
10 half to three percent in a year actually
11 managed to quit and abstained for that period
12 of time.
13 We know it's going to be an uphill battle,
14 but I share some of that up front. I certainly
15 don't minimize this issue, but on the other
16 hand, I don't tip the balance into the negative
17 side of the ledger, but remain positive. And
18 then judge and see how the patient responds and
19 then react accordingly in terms of making
20 suggestions and providing supportive counseling
21 and literature and nicotine replacement therapy
22 as needed. That's just personally the way I
23 approach these patients.

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1 Q Another issue about which you spoke on
2 cross-examination was the fact that there was
3 one hypnosis session with medication and he did
4 not smoke?
5 A Yes.
6 MR. McELVEEN: I object. I don't
7 think he's testified to anything with respect
8 to medication. He said nothing about it.
9 THE COURT: I don't recall it.
10 MR. WARREN HOLLAND: Clonidine
11 was discussed.
12 THE COURT: Why don't you just
13 ask him.
14 Q Let's assume that Mr. Rogers had one hypnosis
15 session and was given Clonidine by Dr. Hanus
16 Grosz and that he did not smoke thereafter, and
17 that that happened I believe on June 24th,
18 1986. How does that affect, if it does, your
19 conclusion that he was addicted if after all
20 these years of smoking he stopped smoking under
21 those circumstances?
22 A Not at all, and I think the scientific and
23 clinical information on this point are very

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1 clear, and that is one need not have an
2 abstinence syndrome as part of the definition
3 of dependence. And it's very clear that
4 patients or persons who quit after using
5 tobacco may not have such a syndrome, and it's
6 also very clear that other individuals who are
7 taking the drugs that we've heard of mentioned
8 today may not have the abstinence syndrome
9 either. So the fact that that didn't occur
10 wouldn't particularly surprise me.
11 I guess secondly, the point that would
12 shape my thinking is that at the time he was
13 hypnotized and at the time he quit smoking, he
14 had a systemic disease, cancer. Small cell
15 undifferentiated cancer is a systemic disease.
16 It affects the body in amazing ways. Cancer in
17 general changes one's feelings about food and
18 smell and all sorts of things, so it wouldn't
19 surprise me that an individual in this setting,
20 after some intervention, in this case hypnosis,
21 would not have an abstinence syndrome.
22 So the short answer -- I apologize for the
23 length of the answer, but the short answer is

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1 that would in no way change my opinion as to
2 his long-term addiction.
3 Q So that the picture is clear, and I think this
4 is important, if he was hypnotized on June
5 24th, do you recall -- I am going to ask you to
6 assume that he had the chest film on July 11th,
7 two and a half weeks later, that resulted in
8 the ultimate diagnosis in August of his cancer.
9 A Yes.
10 Q So, we're talking, what, a two and a half month
11 period between the time that he was hypnotized
12 and was diagnosed?
13 A Yes.
14 Q So this isn't a man who has gone years without
15 smoking; isn't that correct?
16 A Correct.
17 Q There is a danger of relapse in everybody who
18 is addicted and quits, right?
19 A Yes, there is.
20 Q You were asked whether you were a psychiatrist
21 on cross-examination, and of course you
22 answered that you were not.
23 A Right.

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1 Q Do psychiatrists diagnose and treat lung
2 cancer?
3 A No, not usually.
4 Q What percentage of people who are being
5 counseled for smoking cessation would you say
6 are counseled by psychiatrists as compared to
7 other specialties?
8 A Well, a very, very, very small fraction of
9 smokers in the United States are counseled by
10 psychiatrists. By far the vast majority are
11 counseled by family physicians, family
12 practitioners, general internists who are
13 seeing patients across the country. It's only
14 a very small fraction of all of those patients
15 who are actually seen, evaluated and counseled
16 or managed by psychiatrists.
17 Q If you were to describe Richard Rogers'
18 presentation with lung cancer -- well, let me
19 withdraw that, please.
20 What is a classic presentation?
21 A We refer to a classic presentation as a set of
22 symptoms and signs that a patient presents with
23 that represent the predominant set of signs and

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1 symptoms that other people with that particular
2 disease present with. Sometimes that's
3 referred to as a classic case or a classic
4 presentation of a particular disease.
5 Q How would you describe Richard Rogers from the
6 standpoint of his lung cancer in that context?
7 A Well, he would certainly represent the norm, if
8 you will, the classic presentation of a
9 middle-aged gentleman who is a chronic smoker,
10 presents with the symptoms that he presented
11 with, the pain, the associated signs, changes
12 on x-ray and so on.
13 So there really is nothing at all about
14 Mr. Rogers' case that is atypical or unusual at
15 all. It would be, I think, referred without
16 question by general physicians who care for
17 such patients as a classic presentation of
18 small cell undifferentiated carcinoma.
19 Q Having spent considerable time under
20 cross-examination, Doctor, I'm going to ask you
21 whether or not in any way you have any
22 reasonable doubt with respect to your opinion
23 regarding the type of cancer that Mr. Rogers

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1 suffered?

2 A I have no doubt at all.

3 Q And that was?

4 A Small cell undifferentiated carcinoma.

5 Q Do you have any reasonable doubt at all with

6 respect to the cause of his lung cancer?

7 A None at all.

8 Q And that is?

9 A Chronic cigarette smoking.

10 Q Do you have any reasonable doubt about whether

11 or not Richard Rogers was addicted to cigarette

12 smoking?

13 A None at all.

14 Q And what is that opinion?

15 A Sorry?

16 Q And that opinion is that he was?

17 A He was addicted.

18 Q Do you have any doubt at all about the cause of

19 his death?

20 A No.

21 Q And that was?

22 A Chronic cigarette smoking, lung cancer and

23 complications attendant to that.

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1 MR. WARREN HOLLAND: Thank you,
2 sir.
3 MR. McELVEEN: Your Honor, I have
4 a bit of recross, but a number of topics were
5 raised during the redirect as to which we have
6 interposed objections but a fair amount of
7 ground was covered, as your Honor knows. I was
8 wondering if we might ask for about a two- or
9 three-minute recess to sort of allocate
10 recross.
11 THE COURT: Sure. Do you really
12 mean in your heart of hearts two or three
13 minutes? I'm assuming you need some time. I
14 need to excuse the jury at least out in back.
15 MR. McELVEEN: Yes.
16 THE COURT: With that, the jury
17 may rise. You may retire for your afternoon
18 jogging aerobics lessons. We'll be in recess
19 about ten minutes.
20 (The proceedings recessed between 3:50 and
21 4:00 p.m.)
22 (Out of the presence of the jury.)
23 THE COURT: We'll go on the

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1 record at this time, Counsel. During this
2 recess it has been asked of the Court whether
3 or not the Court has a ruling on a pending
4 motion which was entitled "Defendants Joint
5 Objections To and Motion in Limine on the Grosz
6 Affidavit and Related Deposition Designation."
7 The motion raises again issues of
8 admissibility and foundation as it relates to a
9 number of items in an affidavit dated January
10 13, 1989 of Hanus Grosz, H-A-N-U-S, Grosz,
11 G-R-O-S-Z, M.D., that was filed as part of the
12 motion pleadings in the case, the summary
13 judgments, and which is brought back to the
14 Court's attention by virtue of the plaintiffs
15 having filed a supplemental designation
16 deposition, parts of Dr. Grosz's deposition,
17 plaintiff's designation having been filed in
18 the case on January 26th. And the basis of
19 defendant's joint motion is plaintiff's
20 reference to Exhibit 16 from the deposition of
21 Dr. Grosz. Exhibit 16 is, in fact, the same
22 affidavit that has been filed in the cause in
23 relationship -- I'm sorry, in relation to the

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1 summary judgment motion which the Court has
2 previously ruled on.
3 The defendants in the motion generally
4 seek to strike the entire affidavit, for in the
5 affidavit are three kinds of matters that span
6 18 paragraphs. Some of the paragraphs deal
7 exclusively with facts. For example, paragraph
8 2, avers that Dr. Grosz is a medical doctor.
9 The second kind of text that appears in
10 the affidavit are representations or affirmants
11 that deal with opinions and the treatment of
12 Richard Rogers.
13 Some of the paragraphs which have been
14 most persistently attacked are generally 12, 13
15 and 14 in which the averments deal with the
16 opinions that Richard Rogers was strongly
17 addicted; that his dependency reached a level
18 of true compulsion biologically and
19 psychologically; and the opinion in paragraph
20 14, that he was addicted to nicotine and
21 suffered from nicotine dependence.
22 And then the third type of matters that
23 are dealt with in the affidavit are other

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1 opinion evidence that relates to smoking
2 addiction, nicotine dependence, and the
3 unreasonable dangerous qualities of cigarettes
4 for human consumption, which opinions are given
5 apart from the knowledge of and treatment of
6 this particular case of Richard Rogers.
7 I have reviewed a number of briefs,
8 plaintiffs have filed a reply. They have
9 filed -- defendants have filed defendants'
10 counter-designations and the matter has been
11 fully briefed. I was supplied some days ago,
12 it may have been the first day of trial, but
13 some time ago the original deposition of
14 Dr. Grosz. And so I've had the opportunity
15 over the weekend and yesterday to review the
16 brief, the pleadings, the file, the record, and
17 the deposition of Dr. Grosz, which is in two
18 volumes and numbers approximately 500 pages.
19 After doing all that, I am of the opinion
20 that the motion to strike the entire affidavit
21 should be denied, and it is so ordered.
22 However, as it regards certain specific
23 paragraphs, I believe the motion to strike

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1 certain portions of the paragraph as
2 inadmissible under the Indiana Rules of
3 Evidence now that it comes in not as an
4 attachment under 56(E), an affidavit supporting
5 a motion or in opposition of a motion for
6 summary judgment, but now that it is offered as
7 a part of deposition designation and now is
8 subject rather than the 56(E) requirements, the
9 requirements under the Rules of Evidence.
10 It is the Court's opinion that -- and it
11 may be some in some respects unfortunate, but
12 in reviewing the deposition, it is just clear
13 that, for whatever reason, Dr. Grosz is simply
14 unable to form a sufficient foundation of
15 evidence that would support -- whether it's a
16 past recollection recorded, which is the
17 appropriate evidentiary rule which was cited
18 and it is appropriate because it is the only
19 rule which permits admission of hearsay
20 evidence where the declarant or the affiant has
21 totally forgotten and has no recollection at
22 all.
23 The rule that has been cited to the Court

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1 both in plaintiff's and defendants' brief is
2 Indiana Rule of Evidence 803, subparagraph 5,
3 which requires as its foundation -- the
4 witness's past recollection must concern a
5 matter which a person, one, had personal
6 knowledge; secondly, it must have been prepared
7 when the matter was fresh in the memory of the
8 witness; third, the witness will testify that
9 he has no independent recollection.
10 Certainly the witness testified he had no
11 independent recollection, but it's my opinion
12 that the other grounds for admission on that
13 basis simply don't exist. There is the
14 plaintiff's cry and the motion talks about the
15 injustice of not allowing the witness to
16 testify simply because he is ill, but I would
17 suggest to you that even if Dr. Grosz were here
18 in person and his illness did not keep him
19 away, did not prevent him from appearing
20 personally, if Dr. Grosz has no more memory or
21 notes or histories or notations that would
22 satisfy either the Rules of Evidence or
23 otherwise would remember, it's hard for me to

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1 imagine that his ability to give the opinions
2 as he's given in paragraphs 12, 13 and 14, the
3 Court's ruling simply would not be any
4 different on the basis of that.
5 It is the Court's opinion that the
6 deposition testimony and the other matters in
7 the record do not provide sufficient foundation
8 to support the opinion testimony relative to
9 the condition and treatment of Richard Rogers,
10 which is found in paragraphs 12, 13 and 14. As
11 to those paragraphs, the defendants' objection
12 thereto are sustained.
13 That gets us to the particular point we
14 are in the record now. That's the matters as
15 is contained in paragraph 15. Paragraph 15 of
16 the Dr. Grosz affidavit says, "I treated
17 Richard Rogers both with hypnosis and the drug
18 Clonidine .1 milligrams, which drug is
19 sometimes used to assist a person to withdraw
20 from heroin addiction."
21 Had I had an opportunity to rule before
22 the question was asked, I believe that portion
23 of the paragraph that states that he treated

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1 Richard Rogers with hypnosis is foundationally
2 supported by the information in the deposition.
3 What I cannot find supported anywhere is that
4 he treated Richard Rogers with the drug
5 Clonidine .1 milligram.
6 Had I been able to make my ruling, had I
7 known that somehow -- and as I asked, I asked,
8 you recall, do I need to make a ruling on the
9 Grosz affidavit before we go forth, and I was
10 told no, no, no. And indicated to you I'm
11 ready to rule, just that I would prefer it to
12 be in written form and I could have given it to
13 you in written form.
14 So, in any event, I cannot find in the
15 record -- I'll ask plaintiff if you can help
16 direct me in the record that would support the
17 matter of the giving of the drug Clonidine one
18 milligram. I don't find it in the record at
19 all.
20 MR. WARREN HOLLAND: I thought it
21 was in the deposition. I can't represent to
22 the Court it is. It really doesn't matter,
23 your Honor. Clonidine doesn't matter at all.

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1 I'll be happy to handle it however you want to
2 do it. We asked Dr. Jay if it would make any
3 difference, because it really doesn't.
4 I really can't cite it to you. I thought
5 it was in the deposition, discovery or the
6 video, and I can't represent to you where it is
7 if it is.
8 THE COURT: What has been given
9 to me is I have the original two volumes of
10 Dr. Grosz and reviewed that. I have what Mike
11 Holland gave me, which is the transcript of the
12 Richard Rogers video deposition. Mr. Rogers in
13 his treatment with Dr. Grosz is -- I mean, I
14 can't remember whether or not it is even
15 mentioned but I can't find that reference in
16 either. When I got down to that portion of the
17 affidavit, I began looking through the Rogers'
18 deposition the second time and I could not find
19 it.
20 Yes, Mr. Hardy.
21 MR. HARDY: Well, I don't know
22 whether it's appropriate now or not since
23 you're not through with your order.

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1 THE COURT: I'm finished.

2 MR. HARDY: I was going to make a

3 suggestion the way in which the defendants

4 think -- we would submit that the Clonidine,

5 that the Court should strike that portion of

6 the record which relates to Clonidine and

7 instruct the jury to disregard it.

8 THE COURT: I don't have any

9 problem with that, yeah.

10 MR. WARREN HOLLAND: That kind of

11 leaves -- I don't think the jury will

12 understand that. In other words, I would

13 rather --

14 MR. HARDY: He may not understand

15 it but he asked a question after representing

16 that we didn't --

17 MR. WARREN HOLLAND: Come on,

18 I'll ask him one or two more questions,

19 whatever it takes to clean this up.

20 THE COURT: I don't have any

21 problem with the suggestion, because I think

22 it's right. And it really is -- my thought is

23 I'll take a portion of the sort of blame. I

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1 should have just -- I know what I wanted to do.
2 What I am going to do is strike paragraphs
3 and sustain the objection as I indicated before
4 to paragraphs 12, 13, 14 of the Grosz affidavit
5 and that portion of paragraph 15 which deals
6 with the administration of Clonidine and the
7 matters after it.
8 MR. HARDY: Two things briefly,
9 your Honor. I guess we'd be -- do you want to
10 strike the Clonidine reference in the record
11 silently? We don't need an instruction.
12 With respect to the affidavit itself, I
13 simply want to point out and ask the Court to
14 reconsider with respect to paragraph 17,
15 because paragraph 17 recites in part that,
16 according to Dr. Grosz, "No manufacturer of
17 cigarettes has ever to this time ever
18 disseminated a warning or caution."
19 That, I would submit, is both irrelevant
20 in this case and prejudicial to the defendants.
21 There is no claim in this case of an inadequate
22 warning post-June 30, 1969, nor can there be.
23 This suggests in effect that there's something

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1 we have failed to do and that Dr. Grosz doesn't
2 like it. But the plaintiff is not making a
3 claim that we should have -- this is the sort
4 of thing that we got into in opening statements
5 about the --
6 THE COURT: You're saying
7 plaintiff is making no claim for addiction
8 warnings prior to '69?
9 MR. HARDY: The preemption
10 prevents a claim for inadequate warning
11 post-June 30, 1969. Therefore the statement in
12 paragraph 17 is both irrelevant and
13 prejudicial.
14 THE COURT: How about prior to
15 '69?
16 MR. HARDY: It is not irrelevant
17 prior to '69.
18 THE COURT: It is not irrelevant
19 prior to '69, right?
20 MR. HARDY: Right.
21 THE COURT: The problem is it
22 fails to differentiate in accordance with the
23 Supreme Court ruling and preemption is what you

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1 are saying?

2 MR. HARDY: Yes, your Honor.

3 THE COURT: Okay.

4 MR. WARREN HOLLAND: This didn't

5 come out, your Honor.

6 THE COURT: I hear what you are

7 saying, but my problem is that it seems to me

8 that when this jury makes its decision, it will

9 hear what the claims are and the proper

10 definition and instruction on -- you've given

11 me preemption -- I'm sure I saw it in there,

12 that packet of instructions?

13 MR. HARDY: Yes.

14 THE COURT: They're going to be

15 instructed on the fact that the plaintiff's --

16 as a matter of fact, plaintiff is not making a

17 claim, nor is the plaintiff -- I can't remember

18 exactly the language because I read it quickly

19 a week ago, the plaintiff isn't making claim,

20 nor is it appropriate for a claim of any

21 advertising after June of 1969.

22 MR. HARDY: Our position, I

23 guess, is since there is no claim, how can it

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1 possibly be relevant? I think there is clearly
2 prejudice.
3 THE COURT: Well, the problem is
4 that "has ever warned about the addiction
5 potential" would include -- I mean, "has ever"
6 would include both pre-'69 and post-'69,
7 wouldn't it?
8 MR. WAGNER: Judge, if he was on
9 the witness stand, he wouldn't be able to
10 testify like that because clearly he can't say
11 anything about post-1969 warnings. The jury
12 could take it that way. That's the point. So,
13 if he was on the witness stand, he would have
14 to be limited to testifying about things that
15 happened before 1969. So, this statement
16 covered both those periods and, therefore, it
17 is objectionable.
18 THE COURT: Well, I think there's
19 probably other -- I mean, I hear that. I can't
20 change the doctor's affidavit. But I was
21 thinking there's going to be other testimony --
22 MR. WARREN HOLLAND: We don't
23 need that, but I would suggest, your Honor, it

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1 can come out, as far as we're concerned, and 16
2 should come out, too. If this guy can't
3 remember anything else, I don't know why he's
4 permitted to say that he talked to him again
5 and hadn't started smoking.
6 THE COURT: Only because -- 16
7 can come out as well, and I was waiting to
8 check the fact, but the fact is somebody
9 already told me that he had made his second
10 contact, follow-up call with Dr. Grosz, and
11 reported he hadn't started smoking again
12 somewhere. I herd it somewhere without a
13 dispute. So, I was willing to declare a
14 waiver, but it can come out.
15 MR. WARREN HOLLAND: It wasn't
16 from Grosz.
17 THE COURT: No, no, one of you.
18 One of you had mentioned, I thought. That's
19 why I figured --
20 Okay. Let the record show, then, that
21 upon further discussion and argument, the Court
22 does now add to its order of sustaining
23 objections to paragraphs 16 and 17 of the Grosz

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1 affidavit. The Court does now, also, find that
2 the evidence does not support that
3 representation in paragraph 15 of the affidavit
4 that says, "With the drug Clonidine one
5 milligram, which drug is sometimes used to
6 assist a person to withdraw from heroin
7 addiction," is not supported by any of -- the
8 deposition of Dr. Grosz, and it, too, the
9 objection to that is sustained. And the prior
10 references on the record to Clonidine are
11 ordered stricken.
12 The issue of limiting instruction to the
13 jury is one that I believe that you're entitled
14 to, and maybe you already weighed sort of the
15 hazard about that, is that if I make too big a
16 deal out of it, it becomes an important issue
17 when what you want it to do is become a
18 non-issue under the facts of the case.
19 Let me just say for the record I believe
20 defendants' position is well taken to that.
21 You said silently, I guess, before, but at
22 least outside the hearing of the jury I have
23 ordered the references to the drug stricken and

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1 that ruling has been made and you are entitled
2 to limiting instruction. But I can see where a
3 limiting instruction at this juncture on that
4 topic may well have the reverse effect of what
5 you want me to limit it for. So, I will do as
6 the defendants' desire in terms of limiting
7 instruction.
8 Do you want me to be quiet about it and
9 move on?
10 MR. HARDY: Yes, your Honor,
11 please.
12 THE COURT: I can sometimes do
13 that.
14 Mr. Wagner.
15 MR. WAGNER: Your Honor, having
16 ruled on the objections heretofore lodged as to
17 this affidavit, there's another point that
18 comes up in light of the position that we're in
19 in this trial. That is these paragraphs of the
20 Grosz affidavit which are 6, 7, 8, 9, 10 and 18
21 are all cumulative opinions.
22 THE COURT: Why don't we fight
23 the fight when the enemy appears on the

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1 horizon?

2 MR. WAGNER: You mean when this

3 is offered?

4 THE COURT: Yes. This is an in

5 limine, a pretrial, a preadmission -- these

6 haven't been offered yet.

7 MR. WAGNER: That's true.

8 THE COURT: What I am ruling out

9 is those things that are clearly objectionable.

10 What you said to me is, this is all there is

11 and this is all the evidence that we could

12 possibly put in this trial in light of

13 Dr. Grosz's absence that could possibly

14 substantiate these paragraphs.

15 I'm saying that on the basis of that,

16 there are certain of these paragraphs that even

17 if it all came in -- and I'm not, I am not

18 necessarily conceding that everything -- in the

19 deposition, there's some objectionable things

20 in the deposition and I don't concede that and

21 you would not concede that you've waived, if

22 they were to read the Grosz deposition, that

23 you have waived your right to make any other

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1 further evidenciary objections. In fact,
2 you're very careful in every one of your
3 motions to preserve and reserve your right to
4 do that.
5 So, what I am saying is that on the basis
6 of the record before me and the objections that
7 were placed to the affidavit, that there were
8 certain portions of the affidavit that under no
9 circumstances could possibly be -- the man says
10 he doesn't remember what he doesn't remember,
11 or something like that. Something close to
12 that. My opinion is that would render certain
13 numbers of these paragraphs that we talked
14 about objectionable.
15 Okay, do you want a break or do you want
16 to go on?
17 MR. SHEFFLER: I think we can go
18 on, your Honor.
19 THE COURT: Let's roll in about
20 five.
21 MR. WARREN HOLLAND: Your Honor,
22 if at all possible, Dr. Jay has been here two
23 days and --

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1 THE COURT: If he had been here
2 on time today, we might have been done. You're
3 saying you have a lot more or little more?
4 MR. McELVEEN: I have only three
5 or four questions. Bruce has two that he
6 has -- I asked him to go ahead with me, if it's
7 all right, and Jim Kearney by virtue of some
8 things that the doctor raised that are sort of
9 within Jim's bailiwick, had a few.
10 THE COURT: Okay. Give me just
11 about 30 seconds.
12 (Recessed at 4:20 p.m. to resume at 4:24
13 p.m.)
14 THE COURT: Bring the jury in,
15 please.
16 (The jury was escorted back into the
17 courtroom at 4:24 p.m.)
18 THE COURT: The jury may be
19 seated.
20 RECROSS-EXAMINATION,
21 QUESTIONS BY MR. BRUCE SHEFFLER:
22 Q Dr. Jay, I promise you I have very, very few
23 questions for you but I did want to go back to

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1 this green book that Mr. Holland had read from
2 during redirect, if I may.
3 MR. SHEFFLER: May I approach the
4 witness?
5 THE COURT: Yes, you sure may.
6 Q Doctor, you were asked about the preface on
7 redirect. I would like you just to read this
8 paragraph from the preface if you would, second
9 paragraph.
10 A This is a preface, the second paragraph, "We
11 gratefully acknowledge, grant and aid and
12 support from the Tobacco Industry Research
13 Committee during the final stages of this long
14 project. We deem it only proper to inform the
15 reader that all responsibility for the data
16 presented and the views expressed herein,
17 either explicitly or implicitly, rests entirely
18 upon the authors, the tobacco industry research
19 committee's support having been in accordance
20 with its established policy of leaving complete
21 freedom of planning and action to grant and aid
22 recipients."
23 Q Thank you, sir. Mr. Holland read to you from

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1 some of the many articles that are abstracted
2 in here, did he not?
3 A Yes.
4 Q And I read to you some of the abstracts of the
5 many, many articles cited in here, right?
6 A Yes.
7 Q And the 1964 Surgeon General's Committee had
8 available to it all of the articles that are
9 cited in here, didn't they?
10 A Yes.
11 Q In fact, they cited this book as one of its
12 sources that it reviewed in coming to its
13 conclusions about the tobacco habit, did it
14 not?
15 A Yes.
16 Q Doctor, another document from 1942, I believe
17 it was, that was mentioned to you by
18 Mr. Holland, was a study by Johnston that was
19 cited in the 1938 Surgeon General's Report, do
20 you recall that?
21 A Yes, I do.
22 Q That document was as well --
23 A Lennox Johnston?

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1 Q Lennox Johnston, first volume in 1942?

2 A Yes.

3 Q That document was as well cited by the Surgeon

4 General's Report in 1964, wasn't it?

5 A I believe it was, yes.

6 Q It was viewed by them when they reached their

7 conclusion that smoking was a habit, not an

8 addiction, correct?

9 A They did review that and it was part of their

10 conclusion, that's correct.

11 MR. SHEFFLER: Thank you very

12 much.

13 FURTHER RECROSS-EXAMINATION,

14 QUESTIONS BY MR. JULIUS C. McELVEEN:

15 Q I, too, Doctor, am almost finished. Do you

16 still have those two little newspaper articles

17 up there that --

18 A No, I don't.

19 Q Okay.

20 MR. McELVEEN: Warren, do you

21 have your copy? You gave me this original one

22 which I have here, and then we have it, but I

23 mean -- well, let me do it this way.

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1 Q Can I come up there with you, Doctor?

2 MR. WARREN HOLLAND: Here are

3 some.

4 MR. McELVEEN: If you don't mind,

5 I'm just going to, your Honor, if I may

6 approach the witness.

7 THE COURT: Yes.

8 Q There you go, Doctor. Let me ask you to turn

9 your attention to this household radon article.

10 The article, I believe, you've indicated in

11 response to Mr. Holland's questions is,

12 "Household radon is not tied to lung cancer

13 study finds in December of 1994." Down at the

14 very bottom of that first column, would you

15 read to the jury the sentence that starts "Some

16 research"?

17 A Oh, at the end?

18 Q Right, at the end of the first column.

19 A I see. The sentence begins, "Some research has

20 concluded that there is a danger. Other

21 studies such as that in the NCI Journal, the

22 National Cancer Institute Journal, shows no

23 evidence of risk."

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1 Q That's exactly what you said. I believe in
2 response to my question, you said some studies
3 are out there that show an excess risk, some
4 studies are out there that did not show an
5 excess risk?
6 A Yes, I believe that the risk I've mentioned --
7 at least the data I'm familiar with relates to
8 the miners at increased risk. But I am not
9 aware that the issue has been established in
10 terms of the relative risk of non-mining type
11 exposure to radon.
12 Q But if you read the immediate preceding
13 sentence of first column, "However, researchers
14 for years have been unable to prove that
15 residential radon actually poses a lung cancer
16 risk. Some research has concluded that there
17 is a danger. Other studies, such as the NCI
18 Journal, show no evidence risk indicates."
19 Would you not agree, or at least to apprise the
20 reader that studies go both ways with regard to
21 the residential radon risk?
22 A I'm not sure whether that second sentence
23 beginning with some research, refers

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1 exclusively to the first sentence, which is
2 residential. If it does, I would agree with
3 you, but I just don't know whether that's the
4 case or not.
5 Q Now, the immediate preceding sentence to that
6 says, "The Environmental Protection Agency is
7 promoting a national program calling for
8 reduction of residential radon."
9 If household radon is not tied to the risk
10 of lung cancer, why is the Environmental
11 Protection Agency promoting a national program
12 calling for reduction of residential radon?
13 A I can only speculate, but assume that since any
14 risk has been demonstrated, albeit in a mining
15 situation, that the feeling is the prudent
16 public health approach or the prudent public
17 health position, given a reasonable degree of
18 uncertainty here, would be to err on the safe
19 side and try to minimize the risk in a
20 residential setting. That is speculation on my
21 first.
22 Q Turn with me to Nevada 1st, Indiana 7th, for
23 just a second. One of the sentences in that

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1 article says, "The CDC, The Centers for Disease
2 Control," I think you've indicated earlier
3 those initials stand for?
4 A Yes.
5 Q "Found in 1990 that 20 percent of all U.S.
6 deaths or 415,226 were caused by smoking."
7 Now, the government is nothing, if not
8 precise I think you'll agree with me. That
9 doesn't say 225,000, it doesn't say 227, but do
10 you know whether the Center for Disease Control
11 investigated to ascertain whether all 415,226
12 deaths were in fact attributable to smoking, or
13 is this some type of a computer program that
14 the CDC uses to generate numbers of this sort?
15 A In part you've answered the question in that my
16 understanding is that these data are based upon
17 actual surveys and models, computer models that
18 are developed based upon actual rates; and that
19 independent means have been used to validate
20 the accuracy, if you will, of those projection
21 models.
22 So, I guess the answer to the question is,
23 my understanding is that these numbers are

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1 derived from those sources. But the sources, I
2 guess what I am suggesting, have been
3 scientifically validated using independent
4 techniques.
5 Q You would agree with me, would you not, that
6 the Center for Disease Control did not look at
7 415,226 death certificates to draw this
8 conclusion?
9 A I don't know. I suspect they did not. I don't
10 know that for a fact.
11 Q And in fact, you wouldn't be surprised that if
12 the Centers for Disease Control had a number
13 that was the number of deaths that occurred in
14 the United States during the year 1990 and
15 divided by five, they would probably come up
16 with 415,226, right?
17 A I really don't understand the nature of your
18 question.
19 Q Well, it says the CDC found in 1990 that 20
20 percent of all U.S. deaths were caused by
21 smoking and then gives that number. I'm
22 assuming that one of the ways you can get to
23 that number is take the total number of deaths

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1 in the U.S. and divide by five, right?

2 A I'm just not sure that's how they did it.

3 Q The way they did it? Let me ask you this

4 question: Down at the very bottom of that

5 column, it says, "Smoking took its heaviest

6 toll in Nevada where 24 percent of all deaths

7 in 1990 were blamed on tobacco use." A number

8 which I believe is 2,234 Nevada deaths. And

9 then elsewhere in the article I think you can

10 see that 20.7 percent of all deaths in Indiana

11 were blamed on tobacco use.

12 Do you know why the figure of 24 percent

13 was used for Nevada residents and the figure of

14 20.7 was used for Indiana residents?

15 A No, I don't.

16 Q Okay.

17 MR. McELVEEN: I don't have any

18 further questions.

19 FURTHER RECROSS-EXAMINATION,

20 QUESTIONS BY MR. JAMES KEARNEY:

21 Q May it please the Court, ladies and gentlemen

22 of the jury.

23 Dr. Jay, my name is Jim Kearney, I

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1 represent Liggett defense in this case. You
2 haven't herd from me yet. I was hoping that
3 you weren't ever going to hear from me. I
4 didn't meet you at the deposition. I just have
5 a few questions and I know the hour is late.
6 Hopefully we'll get through this quickly.
7 You mentioned in answer to some questions
8 that with respect to cancer rates, that
9 sampling techniques are important and the
10 adequacy of sampling techniques are important
11 in these studies; is that not right?
12 A That's true, that's correct.
13 Q Now, you have made mention here a couple of
14 times of a figure in which you have said that
15 20 million, I believe was the figure that you
16 gave, smokers have attempted to quit smoking.
17 Do you recall you mentioned that figure?
18 A Those figures are from the most recent, as I
19 remember, the most recent Surgeon General's
20 report, the one that's devoted primarily toward
21 tobacco use in children.
22 Q Okay. That means that those figures were
23 reported in that report, correct?

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1 A They were, those figures were reported.
2 Q The Surgeon General did not do the actual study
3 to arrive at those figures; am I correct?
4 A I believe those figures are based on Department
5 of Health and Human Services or Public Health
6 Service surveys, population surveys.
7 Q Okay.
8 A So that I just don't know where that fits with
9 the Surgeon General. Obviously the Surgeon
10 General is within that agency.
11 Q Would you agree with me then that the number 20
12 million is a product of a survey?
13 A My understanding is it's based on a survey,
14 correct.
15 Q It is based on -- survey is a poll, am I right?
16 A I think many people would think of polls in a
17 way that I suppose I would characterize it as a
18 scientific survey as opposed to perhaps a poll
19 which may or may not be a scientific poll.
20 Q Okay.
21 A So, I guess --
22 Q Would you agree with me, though, that this
23 group, whoever did it, did not speak to 20

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1 million people?

2 A Correct.

3 Q Okay. What they did is they took a sampling of

4 folks, am I correct?

5 A I believe that's correct.

6 Q Now, do you know if they did that by telephone

7 or they did it in writing?

8 A Surveys like that, and I can't speak to that

9 specific one, but surveys like that have been

10 done both by written survey reports and by

11 telephone surveys, but I can't tell you in that

12 specific report which technique was used.

13 Q But the specific one that you referred to here

14 to this jury, the 20 million figure, you don't

15 know whether or not that was a telephone poll

16 of a group of folks or whether it was a written

17 questionnaire given to a group of folks; is

18 that correct?

19 A No, I'm aware that that is a survey that was

20 done by a nationally recognized agency that

21 does these things, and my assumption is that

22 those criteria for scientific validation that

23 are used in such surveys was applied to that

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1 one. I can't tell you specifically that I know
2 that it was done. But it was found and
3 referenced in the Surgeon General's report of
4 this year. So, my assumption is that it was.
5 Q Do you, sir, know what question was asked in
6 this survey, whether it was done in writing or
7 by telephone --
8 A I can't --
9 Q Let me finish the question. What question was
10 asked that elicited this data that you are
11 reporting 20 million people tried to stop
12 smoking?
13 A I can't really tell you. I have not seen the
14 specific question. Or if I have, I don't
15 recollect what that question was.
16 Q Do you recall, was the survey done by the CDC,
17 Center for Disease Control, National Health
18 Interview Survey, Health Promotion and Disease
19 Prevention, does that refresh your recollection
20 as to who did the study?
21 A The data I'm familiar with was published in
22 part in the CDC Morbidity and Mortality Weekly
23 Report, which I get and review. So, whether

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1 the CDC sponsored that, I presume they did
2 since that data was presented in that document.
3 Q Okay. So, you don't know if these people were
4 asked whether or not they wanted to stop
5 smoking permanently, do you?
6 A I can't really tell you the specifics of what,
7 how they asked the particular question.
8 Q Would it surprise you if the question that was
9 asked was whether or not you did not smoke for
10 one day during the study period the last year,
11 would if surprise you that that was what the
12 question was that was asked that generated the
13 figure that you read in the Surgeon General's
14 report?
15 A I'm not sure whether I would be surprised or
16 not without a broader context of understanding
17 where that question fits in the overall
18 questionnaire. So, I'm not sure I can --
19 Q So, you don't know whether the 20 million
20 people include folks who did not want to stop
21 permanently?
22 A I presume it did. But I can't tell you
23 specifically.

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1 Q You don't know whether or not the figure, the
2 20 million, includes folks who were not
3 everyday smokers, who were what they call
4 chippers, do you know if the 20 million
5 included chippers?
6 A My recollection is it did include chippers.
7 Q It did?
8 A But I can't verify that for you.
9 Q Your recollection is it did include chippers?
10 A The reason I'm hesitating is that the semantics
11 and the definition of that term, I know, have
12 varied. So, I really can't tell you
13 specifically.
14 Q Would you agree with me --
15 A -- whether it was included.
16 Q -- that chippers generally tend not to be
17 addicted cigarette smokers or are addicted
18 cigarette smokers?
19 A No, I wouldn't agree with you on that point.
20 There continues to be intense study as to my
21 review of the literature, as to the
22 significance of chippers as well as the
23 definition of chippers. Some refer to and use

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1 that term for cigarette smoking as less than
2 five cigarettes a day. I am aware of some data
3 to suggest that although much less frequently
4 found at five or fewer cigarettes per day, one
5 can still find individuals who would fit the
6 definition of dependency. Granted, at a much
7 lower rate.
8 Q So, people in your view who smoke less than
9 five cigarettes a day can be characterized as
10 dependent or addicted smokers?
11 A Yes. The categorization, to my way of reading
12 the literature, interpreting the literature,
13 would say that statistically it's highly
14 unlikely that someone smoking five or fewer
15 cigarettes a day would be dependent. But
16 that's not a hundred percent.
17 Q Would you also --
18 A On the other end of the spectrum, the same
19 might be said. But the more cigarettes you
20 smoke, clearly there is a strong dose response
21 relationship. So, it would be highly likely
22 that one would always see a dependent patient
23 at the higher doses. But occasionally, not

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1 always.

2 So, I guess what I am suggesting is there

3 is -- this is not a hundred percent definition

4 in terms of the chippers. And again, that's my

5 interpretation of this literature.

6 Q Now, Dr. Jay, you mentioned that in the

7 redirect examination, that you read summaries

8 of discovery depositions that were provided to

9 you by plaintiff's lawyers; is that right?

10 A Yes, I did.

11 Q They included summaries of the discovery

12 depositions of Yvonne Rogers?

13 A Yes.

14 Q And they included summaries of discovery

15 depositions of Richard Rogers, correct?

16 A Correct.

17 Q And you said you also looked at the videotape

18 of Richard Rogers, correct?

19 A Yes, I did.

20 Q And that material, the summaries of the

21 depositions, all the summaries you read, and

22 the videotape, provided you with the facts

23 about Richard Rogers upon which you relied in

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1 giving your opinions today; is that right?
2 A Correct.
3 Q This is the summary of the deposition of Yvonne
4 Rogers that was provided to you by the
5 plaintiff's lawyers. And it consists of three
6 and a half pages, three and a quarter pages of
7 text. Am I correct?
8 A Uh-huh.
9 Q And you testified about a Mr. Rogers'
10 involvement with a stop-smoking clinic. And
11 did you read, sir, in this summary that was
12 provided to you by plaintiff's lawyers, the
13 following: "Eventually Dick attended a stop
14 smoking clinic on his own, and went to support
15 sessions and then a follow-up support group.
16 He did not have any confidence in it and did
17 not think it was going to work, and it did
18 not."
19 Did you read that when you came to your
20 conclusions in this case?
21 A Yes.
22 Q And you relied upon it?
23 A Yes, I did.

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1 Q Did you consider that a serious quit attempt on
2 behalf of Dick Rogers, attempt to stop smoking?
3 A I'm sorry?
4 Q Did you consider it a serious quit attempt to
5 stop smoking on behalf of Dick Rogers when you
6 read it in the summary provided to you by the
7 plaintiff's lawyers?
8 A Yes, I believe that the videotape deposition of
9 Mr. Rogers, coupled with the written
10 information, particularly the videotape of
11 Mr. Rogers, led me to the conclusion that he is
12 a strong-willed, independent individual. And
13 my interpretation of his quit attempts which
14 were described back from the age of when he was
15 25 forward, coupled with his effort in
16 approximately 1964 to shift from the cigarettes
17 he had been smoking to so-called light or ultra
18 light cigarettes, represented a significant
19 commitment on his part to try to protect his
20 health; that that, coupled with this attendance
21 at a clinic, which as I mentioned earlier, in
22 my experience is something that most people in
23 general, most of the smokers that I see and

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1 deal with in general -- and there are data to
2 support this -- do not like in general.
3 But the fact that this particular
4 individual, with his personality and the fact
5 that he got up the gumption and went to this
6 clinic, which is a group setting kind of
7 format, to me suggested a man who understood
8 the problem, was grappling with it, trying to
9 do his best to quit, and made this effort to
10 move into a circumstance that was, I'm sure,
11 not to his liking at all, gave it his best shot
12 and came away with the opinion that it wasn't
13 for him. Which I think I mentioned earlier is
14 the opinion of most Americans who attend such
15 clinics, is most Americans don't like that
16 group model. It works for some, but it does
17 not work for most. I think Dick Rogers was one
18 of those who gave it his best shot and it just
19 didn't work for him.
20 Q Thank you, Doctor. I gather the answer to my
21 question, which was do you rely on this
22 information about the stop-smoking clinic that
23 was provided to you by the plaintiff's lawyers,

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1 the answer is yes, you relied on it?

2 MR. WARREN HOLLAND: I object to

3 that, the answer is what was given. So I

4 object to that, and I don't think that's a

5 proper question.

6 THE COURT: I think there can be

7 cross-exam. Are you able to answer the

8 question, Doctor?

9 THE WITNESS: Well, I can.

10 A And the reason that I -- I would say that it's

11 not the case is that I relied on all of the

12 information. If you ask me is that the only

13 basis for my opinion, that document, I would

14 say no, that that's a part of -- an important

15 part, but certainly not the most important part

16 which I believe to me was that that videotape

17 deposition, where I got to know Mr. Rogers, see

18 him, hear him, see his body language. And so I

19 guess that's the best I can do in terms of

20 answering your question.

21 Q I apologize, Dr. Jay. You must have

22 misunderstood my question. I didn't ask you if

23 this was all the information you relied on, I

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1 asked you simply, did you rely on this
2 statement that was included in the materials
3 that the plaintiff's lawyers gave to you?
4 A I relied on that statement.
5 Q Thank you. Now, you did not ask to see the
6 deposition of Yvonne Rogers that was supposedly
7 summarized in this document; am I correct?
8 A Correct. I reviewed two large blue volumes of
9 material that contained the summary
10 depositions, as I understand it, in addition to
11 the videotape, that's correct.
12 Q This is the deposition transcript, discovery
13 deposition transcript of Yvonne Rogers. Have
14 you ever seen it before?
15 A I don't believe I have.
16 Q Okay. Now, Doctor, I'm going to read to you
17 what she says about the stop-smoking clinic.
18 Then I have a question.
19 MR. KEARNEY: I'm reading from
20 page 245, counsel.
21 Q To pick it up, to give context to it, I've got
22 to read a bit ahead.
23 The question is: "Did you tell him this

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1 was a surprise?

2 "Answer: I was -- I may not have said

3 those words, but I was surprised. He had not

4 done that before.

5 "Did he tell you who ran it?" Referring

6 to the stop-smoking clinic.

7 "Answer: No.

8 "Did he tell you where it was located?

9 "I think it was somewhere in town, that's

10 all I can -- that's all I can remember.

11 "Did he tell you how much it cost?

12 "No.

13 "Did he tell you how much it cost?

14 "No. I think I was under the impression

15 at that time that it was a free thing that

16 there must have been something going on, or a

17 health awareness week or a hospital doing it, I

18 don't know what. But I think it was a service

19 being offered. I don't think he made an

20 appointment, paid and went out to do this.

21 "Question: And what led you to that

22 impression?

23 "Answer: Just maybe because how casual he

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1 was about it. I think if he would have paid
2 his money up front to do something, he would
3 have been a little bit more convicted. But,
4 well, yeah, I might go back tomorrow. And then
5 when he went the next day, he just sort of said
6 after that's not for me.
7 "Question: If he had paid money on it --
8 "Answer: He may have taken it a little
9 bit more seriously.
10 "Question: A little bit more seriously?
11 That night you spoke to him about this, was he
12 smoking?
13 "Answer: I'm sure he was. I don't think
14 he quit then. I think he went to the clinic
15 out of curiosity.
16 "Question: What about the next day or the
17 next evening that you saw him? Was he smoking?
18 "Answer: I'm sure he was. I don't think
19 there -- I don't think that there was a
20 point -- that -- I don't think that was a point
21 in time when he had made a serious effort to
22 quit smoking. He just went out of curiosity to
23 see what they would do."

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1 My question to you is: Had you asked for
2 this transcript and had you read that
3 testimony, would that be important to you in
4 determining whether or not this reference to
5 the clinic was a serious effort on the part of
6 Dick Rogers to stop smoking?
7 A No, not at all.
8 Q Thank you.
9 THE COURT: Any further recross?
10 MR. KEARNEY: Judge, I just have
11 a --
12 MR. WARREN HOLLAND: Let him
13 finish his answer or I'm going to object he was
14 cut off. The doctor was obviously midstream
15 here and unless --
16 THE COURT: Well, I think the
17 doctor answered the question.
18 THE WITNESS: He said, "Thank
19 you" before I could complete it.
20 THE COURT: Well, I think the
21 answer is -- it seems to me you responded to
22 the question. We can take it up in redirect,
23 but --

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1 MR. KEARNEY: I beg your pardon,
2 I'll tell you where we are.
3 THE COURT: When you said, "Thank
4 you," we all thought you were finished, and we
5 all jumped up and were halfway home, actually,
6 when you said that. I'm sorry --
7 MR. KEARNEY: May I proceed,
8 then, your Honor?
9 THE COURT: The doctor said he
10 didn't finish his answer.
11 MR. KEARNEY: I'm sorry.
12 THE COURT: Well, I thought you
13 had. Perhaps counsel thought as I had, you
14 had, but you may complete your answer if it
15 wasn't complete.
16 A The short answer is no, but if I could
17 indulge --
18 Q Are you asking me?
19 (Laughter)
20 A I guess I'm not supposed to do that.
21 Q Please ask -- I'll take the short answer.
22 A I apologize. The short answer is no, but let
23 me explain. It's well-known among clinicians

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1 who see patients like Mr. Rogers that part of
2 the process by which one arrives at action
3 involves several years of thinking about the
4 problem of tobacco use, precontemplation, if
5 you will, moving into a contemplation period
6 where the patient begins to seriously grapple
7 with this, and manifests behavior at that point
8 involves testing and trying and asking the
9 question and rejecting the question.
10 So when I see patients, I would be tickled
11 pink if somebody who had smoked chronically and
12 had approximately at that point almost a
13 hundred pack years of cigarette smoking by
14 history, to me the evidence, as it appeared in
15 the videotape, was that this individual has
16 moved through that precontemplation period, is
17 contemplating quitting tobacco, and has moved
18 the next step to actually taking action, albeit
19 the first step. That's an extremely important
20 step in the life of this individual. So I just
21 wanted to explain that.
22 Q Okay. Is what you're saying that at the time
23 that he went to this stop-smoking clinic, he

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1 had not yet come to the decision to, as you put
2 it, grapple with this problem?
3 A I believe he was grappling for a number of
4 years, based on the early testimony that he was
5 impressed by the findings of the Surgeon
6 General's Report, to the point where he was
7 concerned enough to try to shift or switch
8 brands of cigarettes in terms of protecting his
9 health. To me, that's insight that the patient
10 has that this is a problem and I'm grappling
11 with it. So I guess that would be my response.
12 Q I'm just trying to understand your long answer
13 as opposed to your short answer. Are you
14 telling us that at the time, at this time, at
15 the time of this episode with the stop-smoking
16 clinic, that he had not yet made a serious
17 effort to quit smoking?
18 A I believe he had, by his testimony, since age
19 25, had repetitively and repeatedly attempted
20 to quit.
21 Q Now, Doctor, I'm also to understand that you
22 did not read the transcript of the discovery
23 deposition of Mr. Richard Rogers; correct?

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1 A I read everything in the two blue volumes, so I
2 so I read summary, numerous pages, a lengthy
3 document, as I remember. I can't tell you
4 right now how many pages but -- of that
5 deposition.
6 Q Okay. So you've got summaries that were
7 provided to you by the plaintiff's lawyers; am
8 I right?
9 A Correct.
10 Q You did not read the transcript of the
11 deposition; correct?
12 A I don't believe I did, unless that was part of
13 the blue -- the two volumes. I believe I read
14 a summary of that report.
15 MR. WARREN HOLLAND: Could you
16 give us a page number?
17 MR. KEARNEY: Page 84, line 11.
18 Thank you.
19 Q So you did not, when you came to your
20 conclusion in this case, read the following
21 questions and answers from the discovery
22 deposition of Richard Rogers, Volume No. 2, 84,
23 No. 11.

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1 "Question: And were you having any
2 particular health problems at that time which
3 also caused you to go to see Dr. Grosz?
4 "Answer: No, not that I can recall."
5 Were you aware that he had no particular
6 health problems at the time he went to see
7 Dr. Grosz in June of 1986?
8 A I was aware that he did have health problems in
9 the form of chronic bronchitis which was
10 attributed to cigarette smoking, I believe on
11 two -- I believe two different clinical visits
12 with his general physician, his primary care
13 physician.
14 Q Were you aware that Mr. Rogers testified under
15 oath in 1987 that at the time that he went to
16 see Dr. Grosz, he did not have any particular
17 health problems; were you aware that he
18 testified to that?
19 A I was not aware of that if it appears there and
20 not in those summary documents.
21 Q Now, were you aware at the time you came to the
22 conclusions which you have advanced here for
23 the court and jury of the following Q and A,

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1 question and answer, page 88 of the same
2 deposition, counsel, starting line 5, referring
3 to his visitation with Dr. Grosz.
4 "Did he give you any instructions to
5 follow after you left his office?
6 "Answer: No. I had two cigarettes down
7 in the car, and he said throw them out, and I
8 went down to the car, got the cigarettes,
9 walked back in the office and threw them away
10 and went home. He said, 'If you have any
11 trouble in the next six months, we'll do it
12 again half price.' I've had no trouble.
13 "Question: Have you done anything else
14 since your visit to Dr. Grosz to assure that
15 you didn't resume smoking?
16 "Answer: No. Why I didn't do it 20 years
17 ago, I will never know."
18 Were you aware that Dick Rogers gave that
19 sworn testimony in this case, almost a year
20 after he stopped smoking?
21 A I was not, no.
22 Q Let's read very briefly a few other questions.
23 Am I correct, Doctor, that it's your view

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1 that it was possible for Mr. Rogers to achieve
2 long-term abstinence from tobacco at some
3 earlier point in his life, earlier than June of
4 1986?
5 A Yes.
6 Q Am I also correct that you are of the view that
7 even a smoker who is a dependent smoker can
8 still quit smoking?
9 A Correct.
10 Q If he wants to; correct?
11 A Correct.
12 MR. KEARNEY: No further
13 questions.
14 FURTHER REDIRECT EXAMINATION,
15 QUESTIONS BY MR. C. WARREN HOLLAND:
16 Q Is this one of the two big books just like the
17 ones you had?
18 A Yes, it is.
19 Q Let me ask you --
20 A Lots of pages.
21 Q Let me ask you to look at item 116. What does
22 that say?
23 A Page 20, Tab 11, 116.

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1 Q It shows the page number.
2 A Page 84. "Does not recall any particular
3 health problems which caused him to go to
4 Dr. Grosz."
5 Q Okay, then I wonder if you would flip to the
6 next tab there. Would you read the one that's
7 checked there.
8 A This reference is page 88. "He went down to
9 the car, and he had two cigarettes in the car,
10 and he went back into the office and threw them
11 away and went home. Dr. Grosz said that if he
12 had any trouble in the next six months, they
13 would do it again at half price. He had no
14 trouble."
15 Q Then the next one here.
16 A Again, reference to page 88. "Why he didn't go
17 to Dr. Grosz 20 years ago, he will never know."
18 Q So that information was contained in the
19 materials you reviewed?
20 A Yes, it was.
21 Q Doctor --
22 A My memory is --
23 Q Well, I understand. Have any of the questions

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1 you've been asked on recross examination in any
2 way changed your opinion with respect to
3 whether or not Mr. Richard Rogers was addicted
4 to cigarette smoking?
5 A No, not at all.
6 Q And have any of the questions in any way
7 weakened your conclusion with respect to the
8 effect on his freedom of choice on this?
9 A No.
10 MR. WARREN HOLLAND: Thank you,
11 sir.
12 THE COURT: Further questions of
13 Dr. Jay?
14 MR. McELVEEN: No, your Honor.
15 THE COURT: Anybody else? No?
16 Okay. Thank you, Doctor, you may step down.
17 (Witness excused.)
18 THE COURT: Okay, counsel, may I
19 have a brief scheduling conference before we
20 adjourn, please?
21 (Off-the-record discussion was held.)
22 THE COURT: We are going to
23 recess until tomorrow. How are you doing

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1 avoiding the media and the TV? Lock yourself
2 in closets over the weekend, do you?
3 Okay. Well, I just want to continue to
4 remind you of that admonition, you remember,
5 turn it off and turn away, and continue to
6 protect the process, the very important process
7 of jury deliberations in this case.
8 Remember that in addition to not reading
9 written materials that may concern this trial
10 or listening to them on the radio or
11 television, you're continue to keep an open
12 mind until you've heard all the evidence, the
13 final arguments of counsel, and your final
14 instructions.
15 With that, this jury may rise. You may
16 retire and be in recess until 9:00 a.m.
17 tomorrow morning.
18 (At 5:04 p.m., Tuesday, February 7, 1995,
19 the trial proceedings recessed to reconvene at
20 9:00 a.m., Wednesday, February 8, 1995.)
21
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